93-474

No.

FILED
SEP 23 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PASQUALINA SANTORO,

Widow-Petitioner,

vs.

MAHER TERMINALS, INC.,

Employer-Respondent,

– and –

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PHILIP J. ROONEY
Counsel of Record
ISRAEL, ADLER, RONCA
& GUCCIARDO
Attorney for Petitioner
160 Broadway
New York, New York 10038
(212) 227-1350

BEST AVAILABLE COPY

64 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err as a matter of law in holding that the Administrative Procedure Act, 5 U.S.C. 501 *et seq.* (hereinafter APA) mandates an evidentiary standard of preponderance of the evidence in cases arising under the Longshore and Harbor Workers' Compensation Act (hereinafter LHWC), 33 U.S.C. 901, *et seq.*, as well as other administrative proceedings.

2. Did the Court of Appeals err, as a matter of law in digressing from a line of cases holding that in the case of evidentiary deadlock the "true doubt" rule may be utilized by the fact-finder to resolve the relevant issue in favor of the injured employee and his family?

3. Did the Court of Appeals exceed its authority to review cases arising under the LHWC in reversing a decision clearly supported by substantial evidence in the record as a whole on the basis that the evidence was allegedly in equipoise?

4. Is the interpretation of the office of Director of Office of Workers' Compensation Programs, U.S. Department of Labor, of the LHWC entitled to a deference by the reviewing Court.[1]

---

[1] The widow-petitioner mentions this point as it was raised below but it believes it appropriate for the Solicitor to comment upon same. The point will not be discussed herein.

TABLE OF CONTENTS

	Page
DECISIONS BELOW	1
STATEMENT OF JURISDICTION	2
RELEVANT STATUTES	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
ARGUMENT	6
CONCLUSION	11

APPENDIX

1.	Decision of U.S. Court of Appeals for the Third Circuit	A-1
2.	Decision of Benefits Review Board dated March 27, 1992	A-17
3.	Decisions of ALJ Aaron Silverman dated November 22, 1988 and December 15, 1988	A-26

TABLE OF AUTHORITIES

Page

CASES

Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88 (5th Cir. 1990) 6

Baltimore & Philadelphia Steamboat v. Norton, 284 U.S.C. 406 (1932) 7

Banks v. Chicago Grain Trimmers Association, 390 U.S. 459 (1968) 6

Bath Iron Works Corp. v. White, 584 F.2d 569 (1st Cir. 1978) 7

Bosma v. U.S. Dept. of Agriculture, 754 F.2d 804 (9th Cir. 1984) 8

Environmental Defense Fund v. EPA, 584 F.2d 498 (1st Cir. 1976), *cert. denied* 434 U.S. 925 (1977) 8

F.H. McGraw & Sons, 145 F.2d 886 (2nd Cir. 1944) 7

Fidelity & Casualty Co. v. Burris, 59 F.2d 1042 (D.C. Cir. 1932) 6

Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, 988 F.2d 706 (7th Cir. 1993) 4, 5, 7, 9

Greenwich Colleries v. Director, OWCP, 990 F.2d 730 (3rd Cir. 1993) 4, 8, 9

Maher Terminals v. Director, OWCP, 992 F.2d 1277 (3rd Cir. 1993) 2

Page

Mullins Coal Co. v. Director, OWCP, 484 U.S. 135 (1987) 9

NLRB v. Transportation Management, 462 U.S. 393 (1983) 5, 7, 8

Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980) 6-7

Pillsbury v. United Engineering Co., 342 U.S. 197 (1952) 7

Sprague v. Director, OWCP, 688 F.2d 826 (1st Cir. 1982) 7

Steadman v. SEC, 450 U.S. 91 (1981) 5

Strachen Shipyards v. Shea, 406 F.2d 521 (5th Cir. 1969) 7

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 6

Woodley v. INS, 386 U.S. 276 (1966) 8

STATUTES

Administrative Procedure Act 5 U.S.C.:

501 *et seq.* (generally) 1

556(d) (7a) 2, 5, 7

Black Lung Benefit Act 30 U.S.C.:

901 *et seq.* (generally) 4

Judiciary Act 28 U.S.C.:

1254(1) 2

	Page
Longshore and Harbor Workers' Compensation Act 33 U.S.C.:	
901 *et seq.* (generally)	1
908(c)	3
908(b) and (d)	3
919(d)	2
920	7
921(c)	2, 3
REGULATIONS	
20 CFR 727.203(a)	9
CONGRESSIONAL REPORTS	
SR 92-11250, H.R. 92-1441, 92nd Cong. 1972	9
SR 743, 92nd Cong. 2nd Session, 1972	9

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PASQUALINA SANTORO,

Widow-Petitioner,

vs.

MAHER TERMINALS, INC.,

Employer-Respondent,

– and –

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The trial of this matter eventuated in a decision of Aaron Silverman, an Administrative Law Judge of the U.S. Department of Labor, dated November 22, 1988, and a decision and order denying reconsideration dated December 15, 1988. This decision was affirmed by the Benefits Review Board, U.S.

Department of Labor, in an unpublished decision dated March 27, 1992. The U.S. Court of Appeals for the Third Circuit reversed the decision of the Benefits Review Board and remanded the case for further consideration, 992 F.2d 1277 (3rd Cir. 1993). Petitions for re-hearing submitted by the widow-claimant and Director of Office of Workers' Compensation Programs were denied in a decision filed June 25, 1993, ____ F.2d ____ (3rd Cir. 1993).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was dated April 19, 1993 and Petition for re-hearing denied in an order filed on June 25, 1993. Said decision reviewed an order of the Benefits Review Board pursuant to 33 U.S.C. 921(c) (Longshore and Harbor Workers' Compensation Act). Jurisdiction of this Court is invoked pursuant to Section 28 U.S.C. 1254(1).

RELEVANT STATUTES

5 U.S.C. 556(d) Administrative Procedure Act (in relevant part):

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repretitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

33 U.S.C. 919(d) Longshore and Harbor Workers' Compensation Act:

> Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of Section 554 of title

5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities, vested by this Act, on the date of enactment of the Longshoremen's and Harbr Workers' Compensation Act Amendments of 1972, in the deputy commissioners with respect to such hearing shall be vested in such hearing examiners.

STATEMENT OF THE CASE

These proceedings commenced with the filing of claims for benefits for the disability of Michael Santoro arising out of an accident on July 23, 1985 and benefits for death on March 11, 1986 by his widow, Pasqualina, pursuant to the LHWC, 33 U.S.C. 908(c) 909(b)(d). The employer, Maher Terminals, conceded responsibility for the injury to the neck and paid compensation benefits for a period of disability but disputed the claim for benefits for death which was caused by a malignancy in the spine claimed to have been aggravated by the trauma.

The matter duly appeared for formal hearing before an Administrative Law Judge, Aaron Silverman, pursuant to 33 U.S.C. 919(d). Testimony was taken of Michael's widow who described a consistent progression of symptoms subsequent to the injury. Testimony was also taken of Dr. David Yazden, the deceased's attending physician, who stated that the injury caused swelling at the site of a pre-existing, asymptomatic malignancy, causing quadraphlegia and death. The employer's consultant, Dr. Benett Derby (who had never examined the deceased during his lifetime) testified that the employee's death was solely due to the malignancy which coincidently became symptomatic after the injury.

The Administrative Law Judge, after a meticulous review of the record, determined that the issue of causality was still debatable but concluded, in light of the unbroken history of neck pain, that acceptance to the employer's position that the escalation of symptoms and the accident's being purely fortuitous, in light of the record as a whole, would be inconsistent

with the purposes and policy of the Act and resolved the doubt in favor of the claimant. The Employer's request for reconsideration was denied.

The decision was affirmed by the Benefits Review Board on the basis that the decision was supported by substantial evidence and that the administrative law judge (hereinafter ALJ) utilized the proper legal standard in utilizing the "true doubt" rule.

Maher thereupon submitted a petition for review to United States Court of the Appeals for the Third Circuit urging the same issues as before the Board: that the widow has failed to prove her case by a preponderance of the evidence.

Contemperaneous with this case there was argued the case of *Greenwich Collieries v. Ondecko and Director, OWCP*, 990 F.2d 730 (3rd Cir. 1993), a case arising under the Black Lung Benefit Act, 30 U.S.C. 901 *et seq.* in which the "true doubt" rule was likewise utilized and in which the employer argued, as herein, that a preponderance of the evidence standard was mandated.

The lower court's reasoning in both decisions was nearly identical: that the Administrative Procedural Act mandated, in all cases subject to that Act, a legal standard of preponderance of the evidence. In the instant case, the Court did not discuss whether the decision was supported by substantial evidence. The Director, Office of Workers' Compensation Programs, had also argued that the Director's interpretation of the statute was entitled to special deference and the Director accepted the "true doubt" rule as being valid. This argument was not addressed by the Court. Petitions for re-hearing submitted by the widow and Director were denied by the Court.

Interestingly, the Seventh Circuit, within this time frame, heard a case whose facts were nearly on all fours with that of *Greenwich Collieries* and in which the "true doubt" rule was in issue and ruled in direct contradiction to the Third Circuit, that the "true doubt" rule was applicable and that the APA does not mandate a standard of preponderance of the evidence, *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs*, 988 F.2d 706 (7th Cir. 1993).

REASONS FOR GRANTING THE WRIT

It is submitted that this Court should exercise its discretion and grant a review on Writ of Certiorari for the following reasons:

1. The Third Circuit's holding that the "true doubt" rule is inapplicable in cases arising under the LHWC is in conflict with a line of decisions in the First, Second, Fifth, Seventh, Ninth and D.C. Circuits. This Court has not specifically addressed the issue of statutory policy and its resolution is of importance to administration of the Act.

2. The Third Circuit's holding that 556(d) (Section 7(c)) of the Administrative Procedure Act mandates a legal standard of preponderance of the evidence on all cases tried under that Act is an issue of controlling importance in the Federal administrative system, has a direct bearing on rule making and discretionary rule making authority of certain Federal agencies and is in direct conflict with a holding of the Seventh Circuit.

3. There is a conflict between the Third and Seventh Circuit as to the interpretation of this Court's holdings in cases of *Steadman v. SEC*, 450 U.S. 91 (1981) and *NLRB v. Transportation Management*, 462 U.S. 893 (1983), interpreting the Administrative Procedure Act. The Seventh Circuit, in fact, suggested that it would be appropriate for this Court to resolve this claimed conflict, *Freemen United Coal Mining Co. v. Director, OWCP*, cited above, decision on petition for re-hearing *en banc*, ____ F.2d ____ (7th Cir. 1993).

ARGUMENT

The decision of the Third Circuit, if permitted to stand, would impose a retrogressive interpretation on the Longshore Act. It would impose a rigid, mechanistic legal standard on much of the Federal administrative system and severely limit the authority of various Federal agencies to regulate administrative proceedings. It would erode the substantial evidence standard of review of certain Federal administrative bodies.

The standard of review, both of the Benefits Review Board and the several circuit courts, is limited to a determination as to whether the decision of the ALJ is supported by substantial evidence in the record as a whole, *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459 (1968). Substantial evidence, in turn, is "more than a mere scintilla" or evidence that a "reasonable mind might accept as adequate to support a conclusion", *Universal Camera Corporation v. NLRB*, 340 U.S. 474, 477 (1951).

The issue presented for resolution by the ALJ was wholly factual in nature. It is equally clear that his decision is supported by substantial evidence in the record as a whole since it is based on the uncontradicted testimony of the widow and of Dr. Yazden, the employee's attending physician. Yet the Third Circuit's decision is wholly devoid of any consideration whether the decision is supported by substantial evidence in the record as a whole, which it clearly is. Concededly, the courts have both the authority and responsibility to determine legal issues and legal standards but the lower court exceeded its authority by interfering in the method of fact finding of the ALJ.

While the ALJ carefully weighed the evidence, he also concluded that the ultimate factual determination was not without doubt and resolved that doubt in favor of the employee and his widow. In so doing he followed a long line of cases holding that doubtful factual issues should be resolved in favor of the injured employee and his family, the so called "true doubt" rule, *Fidelity & Casualty Co. v. Burris*, 59 F.2d 104 (D.C. Cir. 1932); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88 (5th Cir. 1990); *Parsons*

Corporation of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980); *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978); *F.H. McGraw v. Long*, 145 F.2d 886 (2nd Cir. 1944); *Stratchen Shipyards v. Shea*, 406 F.2d 521 (5th Cir. 1969); *Freemen United Coal Mining Co. v. Office of Workers' Compensation Programs*, 988 F.2d 706 (7th Cir. 1993). This line of cases holds that the compensation claimant's burden of proof under the Act is less stringent than in other civil cases. The rule, in turn, is based on the principle that the Act's liberal and humanitarium purposes require an interpretation in favor of its beneficiary, the injured employee and his family, *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 406 (1932); *Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1952).

This "true doubt" rule must be seen as a component of the substantial evidence rule (as well as the authority of the individual agency courts to allocate the burden of persuasion) i.e. the administrative decision must be upheld by the court even if the resolution of the ultimate factual determination is debatable. It is not an affirmative rule of evidence or procedure but is a deadlock breaking device that is within the discretion of the fact-finder and, for example, cannot be utilized to overturn a decision adverse to the claimant, *Sprague v. Director, OWCP*, 688 F.2d 866 (1st Cir. 1982). The Court below never discussed the propriety of the "true doubt" rule and went so far as to suggest that the principle of liberal interpretation of the Act is adequately served by the limited presumptions of Section 920 of the Act, another novel proposition. Rather, the Third Circuit disregarded the above line of cases and held that the "true doubt" rule contravenes Section 7c of the APA, 5 U.S.C. 556(d). This section was interpreted as mandating a standard of preponderance of the evidence in all cases tried under that Act, absent express statutory exception.

It is impossible to reconcile that conclusion with this Court's specfific holding that the term "burden of proof" in Section 7c determines only the burden of going forward with evidence, not the burden or persuasion, *NLRB v. Transportation Management*, 462 U.S. 393 (1983). That case further affirmed the authority

of the individual agency to determine the burden of proof, an authority extended also to the court's, absent agency or Congressional action, *Woodley v. INS*, 386 U.S. 276 (1966).

The circuit courts had previously likewise held that the APA was not intended to disturb the traditional allocation of the burden of proof, *e.g. Bosma v. U.S. Department of Agriculture*, 754 F.2d 804 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. E.P.A.*, 584 F.2d 498 (D.C. Cir. 1976) *cert. denied sub nom. Velsicol Chemical Corporation v. E.P.A.*, 431 U.S. 925 (1977), quoted with approval in *NLRB Transportation Management*, cited above, Footnote 1, 403-404.

The court below endeavored to distinguish *Transportation Management* by asserting that in that case the burden of proof had been shifted only with respect to an affirmative defense, ignoring that the case also stated that the agency itself had the authority to shift the burden of proof.

The court below, in effect, attempted to overrule *Transportation Management*, by asserting that the controlling case was *Steadman v. SEC*, 450 U.S. 91 (1981). In that case, the agency itself had established a standard of preponderance of the evidence and the Third Circuit relied on dicta contained in a footnote in that case.

The Third Circuit endeavored to reconcile the two cases by asserting that *Transportation Management* was interpreting the first sentence of Section 7c of the APA and *Steadman* the third sentence. This is a labored interpretation as it is the first sentence that contains the phrase "burden or proof" (which this Court has defined as going forward with evidence, not ultimate burden of persuasion) and the requirement of legislative exception. The third sentence of Section 7c, upon which the lower court relied, contains no such language.

The lower court's adoption of identical reasoning in the companion case of *Greenwich Colleries v. Director, OWCP*, cited above, a case arising under the Black Lung Act, as well as breadth of the court's language suggests that the court is holding that

in any and all cases tried under the APA, absent specific legislation, a legal standard of preponderance of the evidence is applicable.

The Seventh Circuit was presented with the identical issue in a case nearly on all fours with *Greenwich Colleries* and arrived at precisely the opposite conclusion, *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs*, cited above. That court adhered to this Court's holding in Transportation Management and specifically upheld the validity of the "true doubt" rule. That court, in considering the petition for re-hearing, suggested that this court should reconcile any claimed conflict between Transportation Management and Steadman, *Freemen United Coal Mining Co. v. Office of Workers' Compensation Programs*, Decision on petition for rehearing, ____ F.2d ____ (3rd Cir. 1993).

The instant case is distinguishable from *Greenwich Colleries*, cited above, and *Freeman*, cited above, as these cases arose under the Black Lung Act, involving the interpretation of certain presumptions at 20 CFR 727.203(a) and this court's holding in *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 1359 (1987). Those regulations and this court's holding in *Mullins* affirmed the power of the individual agency and courts respectively, to allocate this burden of proof independently of the APA.

But the common element in all these cases is the question of the validity of the "true doubt" rule, historically arising under the Longshore Act and recognized as a given by congress in enacting the Black Lung Act, S.Rep No. 743, 92nd Congress, Second Session. (1972).

Congress, in placing adjudication of Longshore cases (as well as Black Lung) cases under the APA intended no substantive change in the respective acts but the elimination of any conflict of interest in the Director's being both administrator and adjudicator of cases, S.R. 92-11250, H.R. 92-1441, 92nd Cong, 1972.

The underlying difficulty with the Third Circuit's overly broad interpretation of the APA is that it would virtually

eliminate the discretionary authority of the individual agency and the courts, based upon sometimes delicate policy considerations, to allocate the burden of persuasion between the parties. As applied to cases under the Longshore Act, the holding would vatiate the principle of liberal interpretation that has been a hallmark of interpretation of the Act since its inception and frustrate the statutory purpose of rapid, inexpensive, adjudication of the rights of the injured employee and his family.

CONCLUSION

WHEREFORE, Petitioner respectfully prays the Court to grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to reverse the decision of said court and reinstate the decision of the Benefits Review Board.

Dated: New York, New York
September 21, 1993

PHILIP J. ROONEY
ISRAEL, ADLER, RONCA
& GUCCIARDO
Attorneys for Petitioner
Pasqualina Santoro
160 Broadway
New York, New York 10038
(212) 227-1350

APPENDIX

Filed April 19, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3222

MAHER TERMINALS, INC.,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondent

PASQUALINA SANTORO,

Respondent

On Petition for Review
of an Order of the Benefits Review Board,
United States Department of Labor

B.R.B. No. 89-443

Argued January 12, 1993

Before: HUTCHINSON, SCIRICA, and ROSENN,
Circuit Judges

Opinion Filed April 19, 1993

JOSEPH T. STEARNS, ESQ. (Argued)
Kenny & Stearns
26 Broadway - 27th Floor
New York, New York 10004
Attorney for Petitioner

PHILIP J. ROONEY, ESQ. (Argued)
Israel, Adler, Ronca, & Gucciardo
160 Broadway
New York, New York 10038-4286
Attorney for Widow-Respondent

MARSHALL J. BREGER, SOLICITOR
CAROL A. DE DEO, ASSOCIATE SOLICITOR
JANET R. DUNLOP, COUNSEL FOR LONGSHORE
MICHAEL S. HERTZIG, ATTORNEY
U.S. Department of Labor
Office of the Solicitor
Suite S-4325
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Attorneys for Director, OWCP

OPINION OF THE COURT

ROSENN, *Circuit Judge.*

We recently had before us the question of whether the "true doubt" rule could be properly applied in the resolution of a claim for benefits under the Black Lung Benefits Act. We concluded it could not. *Greenwich Collieries v. Director, OWCP*, No. 92-3270 (3d Cir. Mar. 23, 1993). This petition for review of a decision of the Director, Office of Workers' Compensation Programs, raises a comparable question relating to the claimant's burden of proof in cases involving the Longshore and Harbor Workers' Compensation Act (Act), as amended, 30 U.S.C. §§ 901-45 (1982). The ALJ in the present case used the true doubt rule, which calls for the resolution of all true doubts in favor of the claimant, to award benefits to the claimant under the Act despite evidentiary equipoise. The issue in this case is whether the Administrative Procedure Act, 5 U.S.C. §§ 501 *et seq.* (1992) (APA), prohibits the application of the true doubt rule in cases involving the Act.

This proceeding originated when Pasqualina Santoro (Mrs. Santoro), the widow of the late Michael Santoro

(Decedent), filed a claim under section 9 of the Act against Maher Terminals, Inc. (Maher), for temporary total disability benefits due the decedent during his lifetime and death benefits on account of his injury and death. *See* 33 U.S.C. §§ 908(b), 909.

Following a hearing, at which the parties vigorously contested whether the disability and death were work-related, the Administrative Law Judge (ALJ) found the evidence on the question evenly balanced and resolved his doubts in favor of the claimant. He awarded benefits and denied a motion for reconsideration. The petitioner, Maher, appealed to the Benefits Review Board (Board) of the United States Department of Labor, which sustained the ALJ in an unpublished decision. It then timely appealed to this court. We vacate the Board's order and remand the case for further consideration consistent with this opinion.[1]

I. FACTS

Because this appeal turns on an interpretation of a narrow question of law, i.e., whether the true doubt rule, as utilized in this case under the Act, contravenes the APA, there is no need to embark on a rendition of the voluminous medical and factual details which are involved in this litigation. We recite only those facts necessary to gain insight into the underlying issues of this appeal.

On July 23, 1985, the decedent, who was then 62 years old, reported an accidental injury while employed by Maher at Port Elizabeth, New Jersey. The claimant testified that on that day, the decedent was driving a vehicle off of a ship at Maher's port. Then, in order to avoid a shackle that was swinging towards him, the decedent threw his body to the right and jerked the back of his neck.

The next day, the decedent visited Dr. Visconti, who diagnosed the injury as a strain of the right and left trapezius muscles. The doctor released the decedent to return to work on July 31, 1985. The decedent returned to

---

1. This Court exercises jurisdiction over a final order of the Board for an injury which occurred within this Circuit pursuant to section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c).

work on August 1 for four hours in the employ of International Terminal Operating Company, and on August 2 for one full day in the employ of Maersk Container Service Company. On August 3, the decedent and his wife began a long-scheduled vacation to the New Jersey Shore, which Dr. Visconti had approved.

During his vacation, the decedent began to experience numbness in the fingers of his left hand, as well as continuing shoulder and neck pain, prompting him to visit Dr. Greifinger, an orthopedic surgeon. Dr. Greifinger reported a diagnosis of cervical strain on a preexisting spondylosis.

The decedent continued his vacation, but called Dr. Visconti on August 14 concerning increased neck and shoulder pain, as well as a new pain in the left arm. Dr. Visconti advised him to go to the hospital for a heart examination, which the decedent did. Finding nothing wrong with his heart, the doctors at the hospital released the decedent, counseling him to wear a neck brace and to take medication. His wife testified that the next day her husband was unable to get out of bed because of numbness in his left arm. Thereupon, he was admitted to a hospital at Point Pleasant, New Jersey.

At the hospital, Dr. Weinstein, following a physical examination and myelogram, diagnosed the patient's condition as a cervical thoracic root avulsion and cervical thoracic myelopathy, and he recommended further testing. On August 18, 1985, Dr. David Yazdan, a neurosurgeon, examined the decedent, and Dr. Yazdan suspected a possible intramedullary tumor or a cystic formation within the spinal cord and recommended immediate surgery. Upon operating on the decedent the next day, Dr. Yazdan found a tumor on the spinal cord, which he identified as an astrocytoma. Subsequently, Santoro was transferred to the Veterans Administration Hospital at Orange, New Jersey, where he died in March 1986.

II. STATUTORY BACKGROUND

Our review of questions of legal interpretation is plenary. *See e.g., Carozza v. United States Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984).

In bringing a claim pursuant to the Act, the claimant bears the initial burden of production, i.e., to establish a *prima facie* case that he suffered an injury and that employment conditions were sufficient to cause the injury. A failure to carry this initial burden defeats the claim. If the claimant establishes a *prima facie* case, then he or she is entitled to a rebuttable presumption under the Act that the injury was work-related and thus compensable. If the employer successfully rebuts the presumption, the factfinder must resolve the factual dispute on the basis of the evidence as a whole. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935).

The problems in many cases, as in this proceeding, is that the factfinder finds the evidence so close that he or she is beset by grave doubt as to the critical issue. Some courts have held that, when considering the evidence on the record as a whole, the judge may resort to the true doubt rule:

> [The factfinder] operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee because the intent of the statute is to place the burden of possible error on those best able to bear it." *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). *In effect, the statute eases the ordinary preponderance of the evidence standard applicable in most civil suits. Id.*

Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 90-91 (5th Cir. 1990) (emphasis added); *see also Fidelity & Casualty Co. v. Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932) ("Where there is doubt, it should be resolved in favor of the injured employee or his dependent family."); *Parsons Corp. of Cal. v. Director, OWCP, United States Dep't of Labor*, 619 F.2d 38, 41 (9th Cir. 1980); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 574 (1st Cir. 1978); *Freeman United Coal Mining Co. v. OWCP*, 1992 U.S. App. LEXIS 4093 (7th Cir. Mar. 4, 1993).

The genesis of the true doubt rule may be found in *Burris*, 59 F.2d at 1044:

> The underlying purpose of all compensation laws is to provide money indemnity in case of injury where there

> is no assignable fault. Accidents in industry are inevitable, and the enactment of compensation laws grew out of a general recognition of a duty owing by society to an injured employee to secure him protection, and this the act seeks to accomplish through the means of insurance built up by premiums paid by employers. Where there is doubt it should be resolved in favor of the injured employee or his dependent family.

The court in *Burris* offered no analytical basis for the true doubt rule. The court properly noted that the compensation laws have their root in society's recognition of a duty to protect injured employees, but the court's leap to the conclusion that this justifies the abandonment or alteration of the claimant's burden of persuasion has no logical basis in the law. Nonetheless, the true doubt rule has become a convenient tool for some courts and administrative agencies to allocate the ultimate burden of persuasion, i.e., to allocate the risk of non-persuasion, to the employer on the theory that he is the party best able to bear that risk.

In the instant case, the ALJ's opinion explained his finding that Mrs. Santoro had established a *prima facie* case and, further, that Maher had successfully rebutted the section 920(a) presumption. As a result, the precedent in *Bowers* mandates that the ALJ evaluate all of the evidence on the record, without regard to the statutory presumption:

> Once the employer has carried his burden by offering testimony sufficient to justify a finding [that the death was not work-related], the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence.

Del Vecchio, 296 U.S. at 286.

Contrary to Maher's assertions, the ALJ adhered to *Bowers* precisely, stating:

> Therefore, the Employer having indicated another cause for, and having severed the possible connection between the claimant's total disability and death, the

> presumption is deemed overcome and the case is decided on the basis of the record as a whole.[2]

In evaluating the evidence on the record as a whole, however, the ALJ ultimately did apply the true doubt rule. He found that the evidence was in equipoise and then summarily resolved the doubt in favor of the claimant:

> In view of this record, acceptance of the employer's position would be inconsistent with the purposes and policy of the Act. The issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the Claimant.

III. DISCUSSION

Section 19(d) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 919(d), requires that any hearing under the Act be conducted in accordance with the provisions of 5 U.S.C. section 554 of the APA. In *Greenwich Collieries*, we held that the true doubt rule was inconsistent with the APA in cases involving the Black Lung Benefits Act.

Addressing the claimant's ultimate burden of persuasion under the Act involved in the case *sub judice*, the first sentence of section 7(c) of the APA provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . .

5 U.S.C. § 556(d).

The third sentence of that section continues:

> A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

---

2. Maher argues extensively about the merits of the presumption and its use as affirmative evidence in its brief. Because the ALJ did not actually make use of the presumption in this case, there is no need to address these arguments.

Id.

The language of the statute, therefore, informs us that, unless superseded by statute, the APA requires that the claimant bear the burden of proof.[3] It is unfortunate that the etymology of the phrase "burden of proof" has so developed that it can be used to mean solely the burden of persuasion, solely the burden of producing evidence, or both. *Greenwich Collieries*, slip op. at 10.

As we observed in *Greenwich Collieries*, some of the confusion surrounding the phrase "burden of proof" has been addressed by the Supreme Court. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the employer asserted that the General Counsel, as the proponent of an order that the employer had committed unfair labor practices, must bear the burden of proof under section 7(c) of the APA. The General Counsel did not dispute that it bore the burden of persuasion with respect to the *prima facie* case regarding unfair labor practices, but it asserted that it should not shoulder the burden of persuasion regarding an affirmative defense that was available to the employer. The Supreme Court stated, in *dicta*, that "[s]ection 7(c), however, determines only the burden of going forward, not the burden of persuasion." *Transportation Management*, 462 U.S. at 403 n.7.

Two years earlier, the Supreme Court stated, "The language of [section 7(c) of the APA] itself implies the enactment of a standard of proof, and that standard of proof is the preponderance of the evidence standard." *Steadman v. SEC*, 450 U.S. 91, 98, 102 (1981). Therefore, *Steadman*, in conjunction with section 7(c), teaches that

---

3. Section 12 of the APA allows for the APA's authority to be superseded by express provisions in statutes. This means that an express statutory provision, such as the section 920 presumption in the Act, would override the rules set forth in the APA. However, none of the following amount to *express statutory* provisions having the authority to supersede the APA on the issue of the degree of evidence which will satisfy the burden of persuasion: the legislative history to the Act, which enunciates its humanitarian and remedial purpose, longstanding use of the true doubt rule by the Board, judicial acceptance of the rule, or Congressional inaction.

the third sentence of section 7(c) means that a sanction may not be imposed or rule or order issued unless the proponent of the sanction, rule, or order proves his or her case by a preponderance of the evidence.

Facially, *Steadman* and *Transportation Management* may appear irreconcilable. However, there are two reasons why our decision today holds that the third sentence of section 7(c) places the burden of persuasion upon the claimant, rendering our decision today consistent with both Supreme Court precedents.

First, in *Transportation Management*, only the first sentence of section 7(c) was at issue, and therefore the Court did not consider the meaning of the third sentence of that section. In that case, the respondent argued that the first sentence of section 7(c), which states that the proponent of an order shall have the burden of proof, means that the claimant bears the burden of persuasion. The Court disagreed, stating:

> Section 7(c) of the [APA] provides that the proponent of an order has the burden of proof. . . . Section 7(c), however, determines only the burden of going forward, not the burden of persuasion.

Transportation Management, 462 U.S. at 404 n.7.

Although the Court appears to have expansively stated that section 7(c) as a whole applies merely to the burden of production, the Court's interpretation of the substance of section 7(c), albeit in a footnote and in *dicta*, was limited to the first sentence. *See id.* ("Section 7(c) of the [APA] provides that the proponent of an order has the burden of proof.") Thus the Court's own language, which it quoted from the first sentence of section 7(c), evinces that the only portion of section 7(c) with which it was grappling was the first sentence. This analysis is supported by the absence of any reference by the Court in *Transportation Management* to its decision in *Steadman*.

Moreover, in *Environmental Defense Fund, Inc. v. E.P.A.*, 548 F.2d 998, 1004, 1013-1015 (1976), *cert. denied sub nom. Velsicol Chem. Corp. v. E.P.A.*, 431 U.S. 925 (1977), upon which the *Transportation Management* Court relied in

reaching its conclusion regarding section 7(c), the court dealt only with the first sentence of section 7(c). There, the court announced that although the APA stated that "except as otherwise provided by statute, the proponent of a rule or order shall have the burden of proof," *Id.* at 1004, "the 'burden of proof' [the APA] casts upon the 'proponent' is the burden of coming forward with proof, not the ultimate burden of persuasion." *Id.* at 1013. Therefore, the Supreme Court's *dicta* stating that section 7(c) is limited to the burden of production was an analysis only of the first sentence of that section.

In contrast, in the *Steadman* case the Court specifically addressed the third sentence of section 7(c). The Court there stated that third sentence of section 7(c) means that the standard of proof necessary to carry the burden of persuasion under the APA is the preponderance of the evidence standard. Therefore, *Steadman*, standing alone, does not allocate the burden of proof, but rather defines its scope as a preponderance of the evidence. It may be suggested that the APA goes no further than this and fails to allocate the burden of persuasion, which gives each administrative agency the discretion to do so without contravening the APA, provided that the party to whom it allocates the burden proves its case by a preponderance of the evidence.

The APA, however, does indeed allocate the burden of persuasion. The language of the APA, coupled with that of *Steadman*, teaches that a sanction may not be imposed or rule or order issued except on a preponderance of the evidence. It is typically the claimant who strives to have a rule or order issued, and the APA prohibits such an issuance unless the proponent of that rule or order proves his case by a preponderance of the evidence. Therefore, it is usually the claimant who bears the burden of proving his case by a preponderance of the evidence.

For example, in the case *sub judice*, Mrs. Santoro seeks to have an order issued that she is entitled to benefits under the Act. She seeks to change the status quo. Hence it is she who bears the burden of proving entitlement to benefits by a preponderance of the evidence. Thus, *Steadman*, and not *Transportation Management*, deals with

the third sentence of section 7(c), and the former is therefore the more relevant precedent for our purposes today.

We find support for our analysis in the legislative history of section 7(c), which states in part:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence.

H.R. Rep. No. 1980, 79th Cong., 2d Sess., at 37 (1946). The first sentence above is relied upon to show that the first sentence of section 7(c), which likewise discusses "the burden of proof," refers only to the burden of production, a proposition not presently in dispute. The second sentence above echoes the language of the third sentence of the statute, which has been interpreted as establishing the standard of proof for the burden of persuasion under the APA, i.e., a preponderance of the evidence. *Steadman*, 450 U.S. at 97-102. The *Steadman* Court's analysis of the statute and its legislative history directly links the statutory requirement that no order shall issue unless "supported by and in accordance with . . . substantial evidence" under the preponderance standard.

If no order shall issue except supported by and in accordance with a preponderance of the evidence, the inevitable conclusion is that the proponent of that order must bear the burden of persuasion by a preponderance of the evidence. We concede that the legislative history previously cited, taken together with *Steadman*, suggests that the party who seeks a denial of relief is *also* required by section 7(c) to sustain such denial by a preponderance of the evidence. In practice, however, it is difficult to imagine how this could lead to an interpretation of section 7(c) that allocates the burden of persuasion *solely* on the

party who contests the grant of relief. If this is done, and the party contesting the claim for relief does not sustain his or her burden of persuasion because the evidence is found to be in equipoise, an order in favor of the claimant will issue that is not supported by a preponderance of the evidence, a result in clear contravention of the APA.

Nor is it possible for adversarial parties to bear the same burden at the same time on the same issue or issues. The only interpretation of the third sentence of section 7(c), in conjunction with its legislative history, that does not of itself contravene the statute or suggest an impossibility is one which allocates the burden of persuasion to the proponent of the order, i.e., the party initiating the proceeding, on the issues raised by that party, but allows the burden to be shifted to the party opposing the grant of relief as to issues raised by the opponent, i.e., affirmative defenses. *See generally Transportation Management.*

A further reading of the legislative history reinforces this view:

> The first and [third] sentences of the section therefore mean that, where a party having the burden of proceeding has come forward with a *prima facie and substantial* case, he will prevail unless his evidence is discredited or rebutted. . . . Where there is evidence pro and con, the agency must weigh it and decide *in accordance with the preponderance.*

H.R. Rep. No. 1980, 79th Cong., 2d Sess., at 37 (1946) (emphasis added). As noted earlier, the party initiating the case has the general burden of coming forward with a *prima facie* case, *id.*; we now see that this party, if it meets both its burden of production (*prima facie*) and burden of persuasion (where "substantial" is construed as standing for the preponderance standard), it will succeed, unless its evidence is unconvincing. Thus, the party initiating the proceeding, i.e., the proponent of the order for relief (the claimant in the present case), has both elements of the burden of proof. Although the burden of producing evidence may be shifted during the progress of a proceeding from one party to the other, the burden of persuasion remains with the proponent of the order for relief, and it cannot be shifted on the issues raised by the proponent.

There is yet a second reason why our holding today is fully consistent with *Transportation Management*: The issue in that case, in contrast to the one *sub judice*, was whether it was permissible under the APA to place the burden of persuasion for an *affirmative defense* upon the employer.

Under the National Labor Relations Act (NLRA), the General Counsel bears the burden of proving by a preponderance of the evidence that antiunion animus contributed to the employer's decision to discharge an employee. *Transportation Management*, 462 U.S. at 397-99; 29 U.S.C. § 160(c). The Board has held that, regardless of whether the General Counsel carries its burden with respect to the underlying claim, the employer can avoid the conclusion that it violated the NLRA by proving by a preponderance of the evidence that the employee would have been discharged for permissible reasons regardless of his involvement in protected union activities. *See, e.g., Transportation Management*, 462 U.S. at 401.

The Court of Appeals for the First Circuit held it to be error for the Board to place the burden on the employer to prove that the discharge would have occurred notwithstanding the presence of the forbidden motive. The court reasoned that the General Counsel, as the proponent of the order, had to carry the burden of persuasion both on the underlying claim and on the affirmative defense. The Supreme Court reversed, stating that the General Counsel, as proponent of the order, bears the burden of persuasion with regard to the underlying violation, but that the Board may place the burden of persuasion regarding an affirmative defense upon the employer. *Transportation Management*, 462 U.S. at 404.

The facts of *Transportation Management*, therefore, confine it to the following sequitur: Where an affirmative defense is available to the employer, the NLRB may place the burden of persuasion as to this affirmative defense on the employer under the APA. This, of course, is only *after* the claimant has first carried his or her burden of proving the elements of an unfair labor practice.

In sum, the first sentence of section 7(c) places the burden of production on the proponent of the order or rule,

i.e., the proponent must go forward with evidence or the case will come to an end. The third sentence of that section establishes the standard for the burden of persuasion, i.e., a preponderance of the evidence, and also allocates the burden of persuasion to the claimant as the proponent of the order or rule. A logical exception to that rule exists, however, when an affirmative defense is raised. In that scenario, the claimant bears the burden of production and persuasion on the subject of the litigation; then, only after the claimant has met this burden, does the defense bear the burden of persuasion on the affirmative defense.

Because the case *sub judice* does not involve an affirmative defense, the burden of production and persuasion both rest upon the claimant, Mrs. Santoro.

Moreover, as discussed exhaustively in *Greenwich Collieries*, slip op. at 15-17, the true doubt rule impermissibly allows a claimant to prevail despite having failed to sustain his burden of persuasion by a preponderance of the evidence. Therefore, the claimant here is required to prove by a preponderance of the evidence that she was entitled to benefits under the Act. The ALJ found that the evidence was in equipoise, which, by definition, means that the claimant did not carry her burden of proof by a preponderance of the evidence. The finding in her favor, therefore, was error.

Although we agree that a compensatory statute such as the Act should be construed liberally in favor of the claimant, *see Pillsbury v. United Eng'g Co.*, 342 U.S. 197 (1952), Congress has written certain presumptions into its compensatory statutes which are quite favorable to the claimant. As we recently stated in *Greenwich Collieries*, we believe that these presumptions effectuate the statute's liberal purpose, and the APA simply does not allow us to grant the liberal construction urged by Mrs. Santoro. Although we recognize that the Act should be construed liberally, that does not empower us to rewrite the provisions of the Act, which require the claimant to prove the material allegations of the complaint. *Greenwich Collieries*, slip op. at 13.

Finally, we address the cases which have upheld the true doubt rule, *see* typescript p.5, and express our reasons for

rejecting them. Most of these opinions that have upheld the true doubt rule, with the exception of *Freeman*, have not seriously grappled with the complications which arise as a result of the APA. *See, e.g., Avondale Shipyards*, 914 F.2d 88; *Burris*, 59 F.2d 1042; *Parsons*, 619 F.2d 38; *White*, 584 F.2d 569. We do not see how the provisions of the APA may be disregarded. The APA is the polestar which guides our course and is the fundament upon which we strike down the ALJ's use of the true doubt rule in this case.

For example, the Fifth Circuit, in upholding the true doubt rule, has observed, "In effect, the [true doubt rule] eases the ordinary preponderance of the evidence standard applicable in most civil suits." *Avondale Shipyards*, 914 F.2d at 90-91. However, as discussed above, the APA does not allow such an arbitrary alleviation of the claimant's burden of proof, a point which that court did not consider.

In *Freeman United Coal Mining Co. v. OWCP*, 1992 U.S. App. LEXIS 4093 (7th Cir. Mar. 4, 1993), the issue was whether the claimant had proven that he suffered from pneumoconiosis. The *Freeman* court itself noted that the Supreme Court has decided in this context that the X ray produced by the claimant may not merely "constitute evidence" of pneumoconiosis, but must show the presence of pneumoconiosis by a preponderance of the evidence. *Mullins Coal Co. v. Director, OWCP, U.S. Dep't of Labor*, 484 U.S. 135, 138, 147-52 (1987); *Freeman*, LEXIS 4093, at *8-9.

The *Freeman* court went on to uphold the ALJ's use of the true doubt rule in that case, holding that the rule is consistent with the APA. We believe, however, that this conclusion cannot follow. If a claimant must produce an X ray to prove the presence of pneumoconiosis by a preponderance of the evidence, then use of the true doubt rule is improper because it allows the claimant to prevail despite having failed to meet this burden. *See Greenwich Collieries*, slip op. at 15-17

III. CONCLUSION

In sum, we hold that the APA prohibits application of the true doubt rule to cases involving benefits under the

Harbor Workers and Longshoremen Act because: (1) under the APA, the claimant bears the ultimate burden of persuasion by a preponderance of the evidence; and (2) the true doubt rule allows a claimant to prevail despite a failure to prove entitlement by a preponderance of the evidence. This contravenes the APA. Because there is no express provision in the Act which overrides the APA, the claimant must prove that her husband's death was related to his work injury by a preponderance of the evidence.

It is not clear, however, if the ALJ in this case ever considered whether the claimant's evidence satisfied the preponderance of the evidence standard. It is possible that, upon reaching the point of equipoise, and believing the true doubt rule to be valid, the ALJ halted his inquiry short of deciding whether Mrs. Santoro's evidence preponderated.

Accordingly, the order of the Benefits Review Board will be vacated with directions to remand the case to the ALJ to make this determination. If the ALJ again concludes that the evidence is in equipoise, then Maher must prevail.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

U.S. Department of Labor

Benefits Review Board
800 K Street, N.W.
Washington, D.C. 20001-8001

BRB No. 89-443 NOT PUBLISHED

PASQUALINA SANTORO (Widow of MICHAEL SANTORO)	)	
Claimant-Respondent	)	DATE ISSUED:
v.	)	MAR 27 1992
MAHER TERMINALS CORPORATION	)	DECISION AND ORDER
Self-Insured Employer-Petitioner	)	

Appeal of the Decision and Order – Award of Benefits and Ruling Denying Petition for Reconsideration of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney and Angelo C. Gucciardo (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Joseph T. Stearns (Kenny & Stearns), New York, New York, for self-insured employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and BONFANTI, Administrative Law Judge.*

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits and Ruling Denying Petition for Reconsideration (87-LHC-833) of Administrative Law Judge Aaron Silverman on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On July 23, 1985, decedent was working for employer driving a car off a cargo ship when a loose shackle swung towards the windshield. In an attempt to avoid the collision, decedent threw his body to the right, allegedly resulting in a "whiplash" movement. Decedent was treated the next day by Dr. Visconti, an osteopath, who diagnosed a strain of the right and left trapezius muscles. Dr. Visconti released decedent to return to work on July 31, 1985, but anticipated follow-up appointments for one to two weeks. Decedent apparently returned to work on August 1, 1985 and worked for one and one-half days.

On August 3, 1985, decedent and his widow (claimant) began a long-scheduled vacation which Dr. Visconti approved. Decedent interrupted his vacation to be examined by employer's consultant, Dr. Greifinger, on August 9, 1985. Dr. Greifinger indicated that subsequent to the July 23, 1985 accident, decedent had complained of neck pain, which radiated into both shoulder and numbness into all the digits of the left lower extremity.[1] Dr. Greifinger diagnosed cervical strain on a preexisting spondylosis. Decedent returned to his vacation, but on August 14, 1985 he telephoned Dr. Visconti complaining of increasing neck and shoulder pain, as well as new pain in his left arm. Dr. Visconti, suspecting possible cardiac problems, advised decedent to go

---

[1] Dr. Greifinger mistakenly refers to the numbness as occurring in the digits of the left upper extremity.

to the hospital. Claimant testified that decedent's heart examination at St. Mary's Hospital was negative and that the examining physicians, relating decedent's trouble to his neck, supplied him with a neck brace and medication.

On August 15, 1985, decedent complained of being unable to get out of bed, nausea, and complete numbness in his left arm and was taken by ambulance to Point Pleasant Hospital, where he was examined by Dr. Weinstein, a neurosurgeon. After a physical examination and review of a myelogram, Dr. Weinstein reported swelling of the spinal cord from C3 to T1 and an irregularity of the root at C7 or T1 on the left side. Dr. Weinstein's impressions were cervical thoracic root avulsion and cervical thoracic myelopathy.

Dr. Yazdan, a neurosurgeon, also examined decedent. After reviewing x-rays, a CT Scan, and a myelogram, Dr. Yazdan reported a mild to moderate degree of spondylosis and a widening of the shadow of the cord at C3 to C4 and below suggestive of an intramedullary tumor or cyst within the cord and recommended immediate surgery. When Dr. Yazdan operated on decedent, a tumor was found which was later diagnosed as astrocytoma, a very rare form of nerve cell cancer. Following surgery, decedent became paraplegic and mute. On March 11, 1986 decedent died, and his certificate of death lists "cardiac arrest" as the "immediate cause" of death, which was a consequence of decedent's cervical astrocytoma. Claimant sought compensation under the Act, contending that the July 23, 1985 work injury aggravated decedent's pre-existing astrocytoma resulting in his disability and death.

In his Decision, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption to link decedent's death and disability to his work injury. The administrative law judge further determined that employer had introduced evidence sufficient to rebut the presumed causal connection between decedent's condition and his employment and accordingly proceeded to weigh the record evidence regarding causation as a whole. After weighing the evidence and finding it to be in equipoise, the administrative law judge applied the statutory policy that

all doubtful questions of fact are to be resolved in favor of the injured employee, *see Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969), and found, based on Dr. Yazdan's opinion, that decedent's death and disability were causally related to the work injury.

The administrative law judge denied employer's Petition for Reconsideration, noting that, as the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A,) and the Board's decision in *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981) (Miller, J., dissenting), no further consideration was necessary.

Employer appeals the award of benefits challenging the validity of the true doubt rule and arguing that the evidence of record as a whole fails to provide any basis for an award of benefits. Claimant responds, seeking affirmance.[2]

Employer's attack on the validity of the "true doubt" rule is premised on the theory that application of the rule violates the United States Supreme Court's holding in *Del Vecchio v. Bowers*, 296 U.S. 280 (1935), that the Section 20(a) presumption does not constitute affirmative evidence. Employer argues that once the Section 20(a) presumption is rebutted, the administrative law judge must then determine whether claimant succeeded in establishing causation by a preponderance of the evidence as any other rule would relieve claimant of the burden of proving coverage thereby obliterating any meaningful distinction between the Act as a compensation scheme and the Act as an insurance program.

Employer's argument regarding the applicability of the true doubt rule is rejected. Although *Del Vecchio* holds that once the Section 20(a) presumption is rebutted, it falls out of the

---

[2] Employer filed a motion to expedite. Claimant opposed this motion contending that it was not actually a motion to expedite but an untimely reply brief. Employer's motion to expedite is moot. Because employer's motion contains substantive arguments, however, we accept it and the responses thereto as supplemental briefs pursuant to 20 C.F.R. §802.217.

case and does not constitute affirmative evidence, *Del Vecchio* is in no way inconsistent with application of the true doubt rule. Under *Del Vecchio*, once the presumption is rebutted and falls out of the case, the administrative law judge must then determine causation by weighing the evidence as a whole without regard to the presumption. It is at this point that the true doubt rule comes into play. This rule requires that if after weighing the conflicting evidence any doubt remains as to how an issue is to be resolved, the doubt is to be resolved in favor of the injured employee because the intent of the statute is to place the burden on those best able to bear it. *Young & Co. v. Shea, supra.* As the true doubt rule is well established in cases under the Act and employer has failed to raise any persuasive arguments attacking its validity, we decline to depart from it. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980). Moreover, as it is well-established that a "preponderance of the evidence" standard is not applicable in proceedings under the Act, we also reject employer's argument in this regard. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *see generally NLRB v. Universal Camera Corp.*, 240 U.S. 474 (1951); 33 U.S.C. §921(b)(3).

Having determined that the administrative law judge did not apply an erroneous standard in analyzing causation under the Act, we narrow our inquiry to whether the administrative law judge properly evaluated the evidence under the applicable standard. In the instant case, as claimant established a harm, a neck injury, and it was undisputed that the July 23, 1985 work accident occurred, the administrative law judge properly found that claimant was entitled to the Section 20(a) presumption. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). The administrative law judge also properly noted that Dr. Yazdan's opinion provided evidentiary support for claimant's assertion that decedent's disability and death were work-related. Dr. Yazdan opined that decedent's spinal cord tumor was slow-growing and dormant prior to the work injury but became symptomatic when the work accident produced edema around the parenchymal (outer) covering of the tumor and that pressure from

the swelling of the tumor within the spinal cord led to decedent's gradual neurological problems and death. The administrative law judge also properly found Dr. Derby's opinion that decedent's disability and death were due to the inevitable progression of the underlying tumor without reference to any external event sufficient to establish rebuttal of Section 20(a). *See generally James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989).

Finding rebuttal established, the administrative law judge proceeded to consider the causation issue based on the evidence as a whole. After thoroughly discussing and weighing the evidence of record, the administrative law judge found that, despite his sometimes inconsistent or contradictory testimony, Dr. Yazdan did not waiver from his basic position that the accident precipitated decedent's disability and death. He noted also that the record establishes an unbroken chain of events supporting a finding of causally-related neck pain and that the alternative offered by employer based on Dr. Derby was that the abrupt escalation of the astrocytoma following the accident was purely fortuitous. The administrative law judge stated that on this record, acceptance of employer's position would be inconsistent with the purposes and policy of the Act. Concluding that the issue of causation remained debatable, the administrative law judge resolved all doubt in favor of the claimant. Accordingly, the administrative law judge found decedent's disability and death related to the work accident.

On appeal, employer contends that Dr. Yazdan's opinion does not provide substantial evidence to support the administrative law judge's causation determination because he wrongfully presumed that decedent had injured his neck in the work accident and his surgical findings and description of the morphology of decedent's tumor are inconsistent with his edema thoery. Employer in addition asserts that medical science has not embraced the theory that astrocytomas may be caused or aggravated by trauma.

All of employer's arguments regarding the credibility of Dr. Yazdan's opinion were considered below and rejected in turn. The administrative law judge issued a comprehensive opinion,

addressing all the evidence in compliance with the rule that where an employment injury aggravates, accelerates or combines with a pre-existing condition, the entire resulting disability or death is compensable, *see Independent Stevedoring Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), as well as the true doubt rule. The administrative law judge found that in spite of the alleged inconsistencies in his testimony, Dr. Yazdan's opinion remained credible because he never waivered from his basic position that decedent's neck pain, neurological deficit and death were traceable to decedent's job-related injury. Although he also found certain elements of Dr. Derby's contrary opinion persuasive, he found that the evidence as a whole regarding causation was debatable and properly determined that under such circumstances the true doubt rule was applicable. Because employer has failed to establish that the administrative law judge's crediting of Dr. Yazdan's opinion is inherently incredible or patently unreasonable, we affirm this determination. *See generally Calbeck v. Strachan Shipping Co.*, 1306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 185 (1991). Under the aggravation rule, the hastening or acceleration of death or disability is compensable. *See Independent Stevedore Co.*, 357 F.2d at 812; *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982) (Ramsey, J., dissenting). In this regard, Dr. Yazdan opined that decedent's underlying astrocytoma may not have become symptomatic for another 20 years but for the work-related injury and related his disability and death to edematous pressure around the tumor resulting from this injury. We conclude that Dr. Yazdan's opinion provides substantial evidence to support the administrative law judge's determination that decedent's death and disability are related to his work injury. As the administrative law judge did not err in relying on this opinion and the true doubt rule, his award of disability and death benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits and Ruling Denying Petition for Reconsideration are affirmed.

SO ORDERED.

/s/Betty J. Stage
BETTY J. STAGE, Chief
Administrative Appeals Judge

/s/R P S
ROY P. SMITH
Administrative Appeals Judge

/s/Reno E. Bonfanti
RENO E. BONFANTI
Administrative Law Judge

CERTIFICATE OF SERVICE

BRB No. 89-0443: Pasqualina Santoro (Widow of Michael Santoro) v. Maher Terminals, Inc. (Case No. 87-LHCA-0833) (OWCP No. 02-0088978)

I certify that this Decision and Order was sent this day to:

MAR 27 1992 /s/Chiu T. Williams Jr.

(DATE) Lisa L. Lanrman, Executive Counsel
Clerk of the Board

Angelo C. Gucciardo, Esq. Certified
Israel, Adler, Ronca and Gucciardo
160 Broadway
New York, NY 10038

Mr. Pasqualina Santoro Certified
207 Dood Street
Weehawken, NJ 07087

Joseph T. Stearns, Esq. Certified
Kenny, Stearns & Broderick
26 Broadway
New York, NY 10004

Ms. Carol A. DeDeo, Esq. Certified
Associate Solicitor
U.S. Department of Labor
Suite N-4635
200 Constitution Avenue, N.W.
Washington, DC 20210

Mr. Richard V. Robilotti
District Director
OWCP-Longshore Division
201 Varick Street
New York, NY 10014

Judge Aaron Silverman
U.S. Department of Labor
Suite 400, North
800 K Street, N.W.
Washington, DC 20001

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
MICHAEL SANTORO (DECEASED)		Case No. :
PASQUALINA SANTORO (WIDOW)	:	87-LHC-833
v.	:	OWCP No.: 2-88978
MAHER TERMINALS CORP.,	:	

Self-Insured Employer

DECISION AND ORDER — AWARD OF BENEFITS

Proceeding for temporary total disability and death benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act).

Issues

1. Whether the Claimant was entitled to compensation for temporary total disability after August 2, 1985, the last day he worked, to March 11, 1986, when he died.

2. Whether the Claimant's death was causally related to a July 23, 1985 work-injury which is claimed to have aggravated an underlying cervical astrocytoma.

Statement of the Case

Michael Santoro, hereinafter, the Claimant, who died March 11, 1986, had been employed as a longshoreman by Maher Terminals, Inc. (Employer) at Port Elizabeth, New Jersey. On July 23, 1985, he was driving a car off a cargo ship when a loose shackle swung towards it. (Tr. 16). Fearing that the shackle would break through the windshield, he threw his body to the right, presumably below windshield level. Mrs. Santoro testified

at the formal hearing held on March 30 and 31, 1988, that, in describing to her his reaction to avoid the oncoming shackle, he "turned the car and doing so snapped the back of his neck and he fell to the seat of the car and the shackle went through the windshield anyway." (Tr. 215). The parties dispute whether his action to avoid the shackle resulted in an actual "whiplash" movement. (Tr. 78-94). At the time of the accident he was 62 years old.

According to Dr. William A. Visconti, Jr.'s report, the accident occurred at 1:30 p.m. on July 23, 1985, and he first treated the Claimant the next day. Dr. Visconti, a D.O., reported that the Claimant told him that he injured his back, and described the circumstances of the accident. He diagnosed strain of the right and left trapezius muscles, and recommended ultrasound therapy and parafon forte tablets. He deemed the Claimant able to return to work on July 31, 1985, but indicated that follow-up treatment should be pursued for one to two weeks more. Mrs. Santoro testified that the Claimant worked a full eight hours on August 1, 1985, but, because of pain in the back of his neck and across his shoulders, he was only able to work approximately 1/2 day on August 2. (Tr. 218-219). However, an NYSA-ILA work printout and an affidavit of the corporate secretary of Maher Terminals, Inc., indicated that the Claimant returned to work for four hours on August 1, 1985, and last worked eight hours on August 2, 1985. (EX-A). The Claimant was paid compensation for temporary total disability for the period preceding his return to work, from July 23, 1985, through July 30, 1985.[1]

On August 3, the Claimant and his wife began a long-scheduled vacation at the Jersey shore. She testified that because of continued pain in the back of his neck and shoulders he telephoned Dr. Visconti prior to their departure to see about going on vacation. Dr. Visconti allegedly advised him to go, taking advantage of the sun and rest. (Tr. 220). Owing to increased

[1] There is nothing in the record to show whether the Claimant worked on July 31, and if not, why not.

pain in her husband's neck and shoulders, she telephoned Dr. Visconti again the next day for further medical advice. (Tr. 221) Dr. Visconti advised continued rest and sunshine. (Tr. 222).

In the interim, the Claimant received a letter from the Employer informing him to consult Dr. David J. Greifinger. Mrs. Santoro testified that, although her husband was inclined initially to postpone this consultation until after their vacation, he was by that time experiencing numbness in the fingers of his left hand, in addition to shoulder and neck pain. (Tr. 222). Dr. Greifinger, an orthopedic surgeon, examined the Claimant on August 9, and submitted a report indicating that subsequent to the July 23, 1985 accident, the Claimant "developed pain about the neck which he describes as radiating into both shoulders." (CX-33). The report noted that the Claimant also described numbness into all of the digits of the left upper extremity, a finding of "recent times." After physical and x-ray examinations, Dr. Greifinger diagnosed cervical strain on a preexisting spondylosis. He advised the Claimant to continue applying heat and to take aspirin.

The Claimant returned to the shore that same day, but on August 14 telephoned Dr. Visconti again complaining of increasing neck and shoulder pain, as well as a new development — left arm pain. Suspecting possible cardiac involvement because of the Claimant's prior history and his left arm pain, Dr. Visconti suggested that he go to the hospital for a heart check. The heart examination at St. Mary's Hospital in Hoboken, New Jersey, was negative. However, Mrs. Santoro testified that the examining physicians said that his trouble was in the neck and supplied him with a neck brace and medication. (Tr. 227, 228). When the medication failed to alleviate the pain, the Claimant called an ambulance on August 15 to take him and his wife to a nearby hospital. Mrs. Santoro testified that he was unable to drive since he got up that morning unable to get out of bed, complaining that he wanted to vomit, and experiencing complete numbness of his left arm, and that she can't drive. (Tr. 229).

He was admitted to emergency services of the Point Pleasant Hospital in Point Pleasant, N.J. at 9:39 p.m., where the admission form indicated among other things that he said "an accident four weeks ago [and] injured his neck." Dr. S. Weinstein, a neurosurgeon, was one of the first of several physicians to examine the Claimant. According to his report, he received a history from the Claimant that, subsequent to the accident at work, "he suffered immediate onset of pain across the lower trapezii, bilaterally, and the lower neck." The Claimant also related to him the evolution of his symptoms and complaints up to his admission to Point Pleasant Hospital. After a physical examination and review of a myelogram, Dr. Weinstein reported swelling of the spinal cord throughout C3 to T1 and an irregularity of the root at C7 or T1 on the left side. He diagnosed cervical thoracic root avulsion and cervical thoracic myelopathy and recommended further testing and consultation. (CX-1).

Dr. Yazdan, a neurosurgeon, examined the Claimant next. In a report dated August 18, 1985, Dr. Yazdan noted that the Claimant's history "goes back to a recent work-related accident that he had during which he sustained a neck injury." (CX-2). After his review of x-rays, a CT scan, and the myelogram, Dr. Yazdan reported a mild to moderate degree of spondylosis, a widening of the shadow of the cord at C3 level down to C4 and further down, which raised the possibility of an intramedullary tumor or a cystic formation within the cord and he recommended immediate surgery. (CX-6). He operated on the Claimant and found a tumor in the spinal cord identified as an astrocytoma.

The Claimant remained a patient at Point Pleasant Hospital until transferred to the Veterans Administration Hospital in East Orange, New Jersey, where he remained a paraplegic and mute until he died on March 11, 1986. The certificate of death (CX-4) lists "cardiac arrest" as the "immediate cause," which was said to have been "a consequence of [deceased's] cervical astrocytoma."

Mrs. Santoro contends that her husband's astrocytoma was aggravated by the July 23, 1985 work-related injury, and hastened his death.

Findings and Conclusions

I .

The Employer paid compensation for temporary total disability from July 23 to July 31, 1985, when Dr. Visconti advised that the Claimant could return to work. However, it contests any causal connection between the July 23 injury and disability from August 1, 1985, to the date of the Claimant's death and between the injury and his death.

Under section 20(a) of the Act, it is presumed, in the absence of evidence to the contrary, that a claim comes within the provisions of the Act. The Claimant, however, has the burden of showing the nature and extent of his injury. *Brocato v. Universal Maritime Service Corp.*, 9 BRBS 1073 (1978).

The section 20(a) presumption applies to the issue of whether an injury is causally related to employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976). Before section 20(a) is applicable, a Claimant must establish that he or she sustained some harm, and that working conditions existed or that an accident occurred that could have caused the harm. *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977); *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326 (1981). Once a Claimant establishes these two elements of his or her *prima facie* case, then the section 20(a) presumption applies to link the harm with the employee's employment. *Lacy v. Four Corners Pipeline*, 17 BRBS 139 (1985). Application of the section 20(a) presumption then shifts the burden to the employer to come forward with substantial evidence countering the presumed relationship between the employee's injury or resultant condition and the work environment. *See Swinton, supra; Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981).

The Claimant sustained a work injury on July 23, 1985. On demonstrating an injury and circumstances at work which could

have caused the alleged injury, the section 20(a) presumption of causation is properly invoked. *Kelaita v. Triple A. Machine Shop, supra.* To overcome the presumption, the Employer must introduce "substantial evidence to the contrary," which the courts have interpreted as evidence specific and comprehensive enough to sever the potential connection between the resultant impairment and work environment. *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). If the Employer is successful, the section 20(a) presumption no longer controls, and the issue of causation is resolved on the whole body of evidence. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982).

In a short note dated October 10, 1985, Dr. Yazdan wrote that the Claimant was totally disabled and his condition was related to the neck injury he sustained at work. (CX-5). In an Attending Physician's Report dated October 21, 1985, Dr. Weinstein set forth his diagnosis of cervical thoracic root avulsion and cervical thoracic myelopathy indicating that the condition was due to the work-related injury. In a letter dated October 31, 1985, Dr. Yazdan set forth a diagnosis of cervical myelopathy secondary to post traumatic spondylotic and neoplastic disorder of the cervical cord and concluded that the work-related injury precipitated his condition causing total disability.

At the formal hearing, Dr. Yazdan testified that the Claimant's tumor in his spinal cord was dormant and asymptomatic until his accident at work. In addition to spraining and straining the neck muscles and ligaments around the spondylotic spine and nerve root, the trauma of the whiplash caused an initial swelling (edema) around the parenchymatous (the tissue around the tumor). Then, the constant rubbing of the swollen spinal cord against the vertebral canal owing to the Claimant's ordinary regular movement of his head gradually increased the swelling. The swelling caused the pressure that triggered his symptoms, led to his neurological breakdown, and hastened his death.

In rebuttal of the presumption and Dr. Yazdan's opinion on causal relation, the Employer presented the testimony of Dr. Bennett W. Derby, a diplomate in pathology and neurology and,

among other impressive professional credentials and assignments, long affiliated with the University Hospoital, New York Medical School. Although he had never examined the Claimant, he had carefully reviewed all of his pertinent medical records. According to Dr. Derby, the evidence failed to establish a whiplash or neck injury; if there was such an injury, the Claimant would have experienced immediate pain and neurological collapse "on the spot;" Dr. Yazdan's explanation involving edema is "medically impossible;" and the Claimant's disability and death were due to the inevitable progression of the underlying tumor "without reference to any external event."

Therefore, the Employer, having indicated another cause for, and having severed the possible connection between the Claimant's total disability and death, the presumption is deemed overcome and the case is decided on the basis of the record as a whole.

II

The Employer argues that the integrity of Dr. Yazdan's analysis must depend on two things: (1) the occurrence of immediate and excruciating pain at the moment the Claimant's spinal cord contacted the vertebral canal as a result of the work-related accident, and (2) the presence, in fact, of edema gradually increasing and causing the pressure leading to the Claimant's neurological collapse. These depend on the assessment of Dr. Yazdan's candor and the reasonableness of the inferences that can be drawn on the basis of all the available information. Further, Dr. Yazdan's candor should be assessed on the basis of the consistency of the opinions he expressed or by his ignorance of the complete medical record.

It submits that inconsistency in Dr. Yazdan's opinion can easily be demonstrated by his differing expressions on the nature of the injury the Claimant sustained, the severity of the trauma or pain experienced, the appearance of the spinal cord, the presence of edema in the cord, and the characteristics of the astrocytoma.

Accordingly, it contends that Dr. Yazdan's opinion on causal connection between the Claimant's accident and his disability and death should not be preferred over that of Dr. Derby who had reviewed all the medical records whereas Dr. Yazdan had not seen the reports of Dr. Visconti and Dr. Greifinger in which the Claimant's history and complaints differed from Dr. Yazdan's consultation report.

III

A material issue in this case is whether the Claimant experienced neck pains which persisted from the time of the July 23, 1985 accident to the time Dr. Yazdan examined him.

The Employer argues that there is no valid medical evidence in the record to support Dr. Yazdan's statement in his consultation report that the Claimant's history went "back to a recent work-related accident during which he sustained a neck injury." It argues that Dr. Visconti's report fails to show that the Claimant sustained a whiplash or any other type of neck injury or that the Claimant complained of neck pain or any condition that would have prompted Dr. Visconti to take an x-ray. Since Dr. Visconti diagnosed bilateral trapezius strain on the basis of subjective complaints and palpation of the area, any inferences of neck pain through trauma and contact of the spinal cord with the vertebral canal are obviated. It contends further that the Claimant's complaints of neck pain to Dr. Greifinger were "new" complaints, appearing but a few days before Dr. Greifinger's examination on August 9, 1985.

Dr. Greifinger's medical report reveals that left arm numbness and not the Claimant's neck pain was of "recent origin." Dr. Greifinger noted:

> ...The Patient stated that he hit something which then came up and hit the windshield of the vehicle. *He developed pain about the neck* which he describes as radiating into both shoulders. He has also described numbness into all of the digits of the left upper extremity. This latter finding has been in *recent* times.

(EX-4; emphasis added). Two other references in this report make no mention that the neck pains were of recent origin. However, on examination Dr. Greifinger found "Motions of the cervical spine were restricted with a complaint of pain in virtually all postures." (C-4). Regarding Dr. Greifinger's findings, the Employer refers to Dr. Derby who testified that he could not agree with Dr. Greifinger's diagnosis of a cervical strain on a pre-existing spondylosis because there are no findings of muscular symptoms necessary to support that diagnosis.

It is concluded that the weight of the evidence is sufficient to support a finding that, as Dr. Yazdan testified, the Claimant complained of neck pain "all along." The record shows that the Claimant gave a history of neck pain starting with the accident to all the physicians who examined him after Dr. Visconti. It would be unreasonable to infer that under the circumstances the Claimant, who was so fearful about what was wrong with him, would deliberately lie about the history of his pain to a doctor from whom he would be seeking relief. Secondly, since he did not know what was wrong and had no reason to believe the condition could be due to something other than his most recent disability for which the Employer had already assumed liability, there is little reason to believe the history he gave to the examining physicians was motivated by a quest for secondary gain. Thirdly, in agreement with Dr. Yazdan, Dr. Derby testified that spinal cord astrocytomas are "very very rare" tumors and "if a guy walks into your office you do not think of cervical astrocytoma." He explained that with Dr. Greifinger's findings of neurological symptoms in the Claimant's left arm the diagnosis cannot be muscular or a sprain. It must be the spinal cord. If, as Dr. Derby believes, that Dr. Greifinger misdiagnosed a muscular problem even partially based presumably on the Claimant's complaints with the neurological symptoms evident then the value of Dr. Visconti's simple diagnosis of muscular strain before such tell-tale symptoms appeared has to be regarded with considerable reservation. Lastly, Mrs. Santoro, who was determined to be a credible witness testified that the Claimant complained of neck pain from the very beginning.

IV

The basic issue, then, is whether the Claimant's disability and death, as well as his neck pains, were causally related to trauma on July 23, 1985, or solely a result of the spontaneous eruption and natural progression of his astrocytoma.

Dr. Yazdan testified that astrocytomas are extremely rare in the spinal cord. They are generally slow-growing and can be present for many years before a patient becomes symptomatic. He testified that a tumor "leathery" in texture, in contrast to a softer or "mushy" one, generally grows more slowly and is less infiltrating and malignant. He testified that upon reaching the tumor within the spinal cord during the myelotomy, he found that "it appeared to be slightly fluctuant, very firm and leathery in consistency..." (Tr. 39). According to Dr. Yazdan, with Dr. Derby in general agreement, whether a tumor like an astrocytoma is rapid growing or aggressive can be confirmed on the basis of an observation or analysis of it being leathery or mushy.

Although Dr. Derby conceded that tough leathery-type tumors are slow-growing, he indicated and the Employer agreed that Dr. Yazdan's testimony concerning whether the tumor's prominent feature, the mushroom deformity at C3-C4, was thin and fluctuant or firm and leathery was inconsistent with his August 19, 1985 operative report, as well as, his testimony on cross-examination.

Notwithstanding vigorous cross-examination on his different descriptions of the tumor's morphology, in the final analysis, Dr. Yazdan firmly maintained that the mushroom portion was quite hard and denied that because parts of the tumor were fluctuant, they were mushy. In evaluating his overall testimony against this particular charge of inconsistency, note is taken of his October 31, 1985 letter to an attorney in which he wrote, "The tumor had a very rough and leathery-like consistency...." (C-6) That was over a year before the claim for benefits was filed in this matter in November 1986, and it is reasonable to assume apparently long before he could have anticipated the

test he would undergo at the hearing concerning his conflicting testimony.

Although subject to call as conjecture, note is also taken of the possibility, with some foundation in the record, that owing to a communication gap the use of the word "fluctuant" by Dr. Yazdan received a meaning he did not intend or expected it to convey. His testimony at page 183 of the transcript leads to that impression:

> Q Okay, you found, at least in areas of this tumor, did you not, that the tumor was fluctuant.
>
> A *It appears fluctuant* –
>
> Q On the –
>
> A – by touching – by touching it, you see?
>
> Q Okay.
>
> A However, when we punctured it, because anytime there's a fluctuation, you got a puncture, you do less damage to the cord than if you can evacuate the cyst.
>
> So the whole purpose of this whole thing is to be able to save as much of the cord as possible. So when we did that, there was no fluid, *then I knew that the fluctuation was just going back and forth of the lesion, under the needle.* (Underlining added).

What Dr. Yazdan seems to be saying is that rather than mushy, as fluctuant can be defined, the mushroom part of the tumor was "pliant" which does not rule out its texture as tough and leathery.

V

The significance to Dr. Yazdan of a slow-growing, leathery-type tumor is that, in his opinion, the Claimant's tumor, but

for the work incident, could have remained dormant for many years. Until the accident, the Claimant was symptom free. The trauma caused the edema which contributed to his disability and death.

The Employer spelled out how Dr. Yazdan contradicted himself on the nature and the severity of the trauma and argued against his "theory" because of his ignorance or uncertainty concerning not only the nature and extent of the injury, but also the site of the injury, in addition to the fact that he never saw or reported evidence of edema.

The Employer contends that Dr. Derby's opinion is entirely consistent with the medical evidence. Dr. Derby testified:

> THE WITNESS: This is my opinion based on the information in the hypothetical question I was just asked in which I asked to assume that neck pain had been present since the day of the accident persistent thereafter into the full evolution with the first appearance of neuorlogical signs a good many days later. I won't repeat the dates, you're familiar with this, a long delay. This is medically impossible. We have a tumor – correction, we have a spinal cord at the cervical level which is shot through with tumor so bad that it's necrotic.
>
> Although the spinal cord tumor itself shows minimal widening the cord is further indented by at least one, one report or two, second report, osteophytes pushing in from the vertebral bodies from the front.
>
> BY JUDGE SILVERMAN
>
> Q How long are those osteophytes, what are we talking about, needle point bony spurs?
>
> A They're spurs like coming off the back of rooster's hoof.

Q What are we talking about?

A Bony –

Q In size.

A They're bony protuberances.

Q I understand. What size are we talking about, needle point size?

A No.

Q Pencil point size?

A Pencil point thickness. They come off like a bar and move on a broad front, sometimes more on one side, sometimes more on the other but if in the middle line it indents the cord. So here we have a man whose cervical spinal cord is shot through with tumor which is so aggressive that the spinal cord is necrotic at that level which in addition is compromised by these two osteophyte pencil thickness indentations in a side to side manner, pushing in. If this man had a flexion extension, that is to say whiplash sort of mechanism injury on July 23, 1985 so severe as to have caused pain, back neck pain, he would have had immediate neurological decompensation, and I'm going to spell that out, a flexion extension. I am asked to assume, I do not believe but I am asked to assume a "whiplash" injury, that's a whip like – like you're snapping a whip, that's a bad shake-up, number one; number two, it implies a pretty severe degree of flexion and extension. It would not be medically possible for a man with that kind of injury with the cervical spinal cord shocked [sic] through with a necrotic tumor also being pushed in on by two osteophytes to have not had immediate neurological symptoms and deficit on the spot and if not on the spot within a few minutes.

> It would be medically impossible for that cord in that condition given a violent whiplash to not have decompensated into deficit on the spot, it's not medically possible. (Tr. pp. 286-288).

Further on, Dr. Derby said:

> A Michael Santoro had a naturally occurring astrocytoma centering on the cervical spinal cord which had been there for a long, long time, one portion of which at C3-C4 abruptly escalated, intrinsically, naturally, spontaneously, biologically in and of itself without reference to any external event into an accelerated much more malignant phase of growth which started literally breaking down the spinal cord and did so piece by piece. The tumor had not caused symptoms all that earlier time to our knowledge because at that point it was infiltrative and in a less aggressive form. It is when it spontaneously broke in and of itself into this more aggressive highly malignant form that the symptoms began and the whole thing was indigenous to the spinal cord without reference to anything else. (Tr. p. 304).

VI

This record presents the unenviable task of resolving the ultimate issue from conflicting probative evidence. It is an arguable case to which the rule that doubt concerning evidentiary conflicts should be resolved in favor of the Claimant is deemed applicable.

Although Dr. Derby's response, above, to the hypothetical question was based on the assumption that neck pain had been present and persisted since the day of the accident, he was most emphatic and convinced, partially on the basis of the reports of Drs. Visconti and Greifinger, that the Claimant never suffered a neck injury.

As mentioned above, there is nothing in Dr. Greifinger's report to support the contention that the Claimant's neck pain was something new which appeared after he was discharged by Dr. Visconti as "cured." Insofar as Dr. Visconti's reports are concerned, they are dismissed as probative evidence of a full medical evaluation of the Claimant's symptoms and overall condition and are looked upon as no more than a perfunctory billing for office visits. Any reliance on them in formulating an argument or opinions is believed to be of little value.

Other than that, Dr. Derby's testimony provided a high level of persuasion and there is some merit in the Employer's position, taking into account the differences it pointed to in Dr. Yazdan's testimony that, in effect, Dr. Yazdan's opinion is a gratuitous "theory" to put the Claimant's case in the best light.

However, there is no doubt that the Claimant had an accident and although there is no reliable evidence to determine whether the Claimant actually sustained a violent whiplash injury, there is also no evidence as to what really happened in the accident, but it is found that something did happen and that as a result the Claimant sustained some type of traumatic insult to or around his neck of which he complained of pain from the very beginning which Dr. Yazdan believed and relied on for his opinion on causal connection. That opinion is anchored in his experience as a hands-on neurosurgeon.

In his direct testimony, Dr. Yazdan likened the Claimant's slow-growing tumor to the existence of an underlying degenerative disease:

> "We have two conditions in this gentleman which existed, most likely, prior to this accident. One was a slight degree of osteoarthritis or spondylosis, which is quite common. You have it, I have it, everybody over 35 or 40 has a little bit of it. We live with it for many, many years, 20 or 30 years. Nothing happens until something happens, either accident or a fall or a whiplash, or whatever you want to call it. Then the

individual becomes symptomatic, then he comes to us, then we take the X-ray, then we naturally don't see anything except a slight degree of osteoarthritis and then, we tell the patient: 'Yes, you do have some arthritis.' And immediately, he says: 'Well, I have no problem.' He get very, very upset. He says: 'I only have problem since I have this accident. How can you tell me I have this problem before?' And this is a very common problem we get in the office and in the hospital and also it's a leg – legal problem."

"The answer is very simple, that you have a dormant problem which may be spondylosis or anything else and it's silent, at least in that particular moment, in time. Then something happens which aggravates the tissues in or around that region that you are talking about.

(pause)

When that happens, the area becomes swollen and inflamed. If we think just a simple sprain and a strain, these patients are symptomatic sometimes more than even a year, they get headache and neck pain, it leads to chronic myocytis and it started with a sprain or a strain to begin with. Sometimes, they get a pain down the arm if they have a spondylosis associated with it.

"Now, in this gentleman, we had additional dormant problem which was this tumor within the cord, that this was an active man, he was doing very, very had work, I understand, and he was completely asymptomatic until this thing happened, until this accident. The trauma of the whiplash, acceleration and deceleration, did cause swelling around the parenchymatous or the tissue around the tumor, in addition of spraining and straining the neck and the ligaments around this spondylotic spine and the nerve root.

So he had a mixture of symptoms which were all precipitated one way or another by this accident.

Now, we are not saying that it was caused by the accident, so that's where the controversy is. You know, people think when somebody is saying about their spondylosis or the astrocytoma was caused by trauma. Well, that's not true. We know that's not true. Trauma does not cause neoplasm, any kind of neoplasm, we know that.

(pause)

Trauma, on one shot deal doesn't even cause a spondylosis. Although in multiple trauma and grinding does cause that.

However, go back in – go back to astrocytoma, this tumor or this lesion initially was dormant there and he might have gone another 15 or 20 years before he would become symptomatic.

(pause)

But this injury expedited the whole situation."

Q In other words, doctor, if I understand you correctly, the injury did not cause the tumor to grow.

A No.

Q It did cause edema, apparently.

A Yes, yes.

(Tr. pp. 48-50).

When pressed on cross-examination concerning his opinion and whether the tumor activated by itself, he responded:

> Yes, it is possible if we assume this is the only case in the literature, but having seen the behavior of these tumors and having seen many, many dormant problems in the patients who become – many all – they all manifest themselves after the trauma or become symptomatic, makes an expert or anybody who has got some experience, think that yes, there is a correlation between the precipitation of the symptoms and trauma.
>
> *If this was the only case in literature, I would go along with you, but that's not the case. We do see this quite often.* (Underlining added). Not necessarily with the spine – astrocytomas of the cord. I get a patient comes with a concussion of the brain, I do a CAT scan, there's a meningioma. Now all of a sudden, this patient is symptomatic. Sure we know that the concussion didn't cause the meningioma, but definitely, the concussion caused some edema around the tumor, which made the patient symptomatic. So how can you say there's no relationship? (Tr. pp. 173-174).

Although Dr. Yazdan admitted that he did not see edema during surgery or mention it in his operative report, he explained that edema is not something one sees under a microscope as he used in the operation. Dr. Derby conceded that edema does accompany a tumor, at least some of the time (Tr. p. 354), but edema never causes anything (Tr. p. 337). However, his view [without more personal enlightenment and perhaps a better understanding here] does not square with the impression of Dr. Friedman who examined the Claimant August 20, the day before surgery. Of relevance and significance is that part where he says "At this point it appears that both of his intercostal and phrenic nerves *are affected*, possibly just by edema or perhaps this is permanent ...' (underlining added).

That the nerves can be affected by edema, according to Dr. Friedman, or that the function of the nerves may be reacting to the effect of edema on them, adds credence to Dr. Yazdan's position.

The type of the Claimant's underlying neoplasm poses one of the greatest difficulties in resolving the basic issue in this case. It seems evident or reasonable to acknowledge that the causes and the factors controlling many malignancies are still obscure and under research. Added to that, as this record shows, is the problem that persons invaded by astrocytomas are extremely uncommon. Dr. Derby testified that the disease is not known to medical science to be caused or aggravated by trauma. (Tr. p. 305). However, there is nothing in this record to indicate whether any statistical studies have been done in that area. Further, Dr. Yazdan's position is based primarily on the edema resulting from trauma rather than trauma directly, and death attributed to edema has been diagnosed. *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir 1965). The problem is further complicated by the relationship of the disease to the host. As Dr. Yazdan pointed out one can't generalize tissue reaction or responses to trauma. (Tr. p. 130-134)

Despite the inconsistent or contradictory testimony, Dr. Yazdan did not waiver from his basic position that there is a history of neck pain traceable to the Claimant's job-related accident which precipitated his subsequent disability and death. The record, for the reasons discussed, has been determined to establish an unbroken chain of events supporting a finding of causally-related neck pain. The alternative is to conclude on the strength of Dr. Derby's expertise that the occurrence of the abrupt escalation of the underlying astrocytoma and the job-related accident was purely fortuitous without any relationship one to the other. In view of this record, acceptance of the Employer's position would be inconsistent with the purposes and policy of the Act. The issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the Claimant.

Upon consideration of the record as a whole, it is found and concluded that the Claimant's disability and death is causally related to his accident on July 23, 1985.

ORDER

The Employer shall:

1. Pay compensation to the Claimant's eligible survivors for total disability from August 3, 1985, to March 11, 1986, and death consistent with the applicable provisions of the Act and the regulations.

2. Pay and reimburse those entitled to benefits all medical and other related costs incurred as a result of the Claimant's disability and death as may be required by the applicable provisions of the Act and regulations.

3. Pay all interest and penalties, if any, in accordance with the applicable provisions of the Act and regulations.

/s/Aaron Silverman
AARON SILVERMAN
ADMINISTRATIVE LAW JUDGE

AS/sem

Dated: NOV 22 1988
Washington, DC

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

MICHAEL SANTORO (DECEASED) PASQUALINA SANTORO (WIDOW)	:	CASE NO. 87-LHC-833
Claimant	:	
v.	:	OWCP NO. 2-88978
MAHER TERMINALS, INC.	:	
Employer	:	

RULING DENYING PETITION FOR RECONSIDERATION

By Decision and Order of November 22, 1988, the subject Claimant was awarded disability and death benefits.

On December 9, 1988, the Employer petitioned for reconsideration on the issue whether the rule of doubt was properly applied by the administrative law judge to the facts found.

It is believed that the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the requirements of the Administrative Procedure Act and the views expressed by the Benefits Review Board in *Betz v. Arthur Snowden Company*, 14 BRBS 805 (1981), and further consideration would serve no useful purpose.

Accordingly, the petition for reconsideration is, hereby, *DENIED.*

/s/Aaron Silverman

AARON SILVERMAN
ADMINISTRATIVE LAW JUDGE

AS/sem

Dated: DEC 15 1988
Washington, DC

Nos. 93-474, 93-744

Supreme Court, U.S.
FILED
DEC 10 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PASQUALINA SANTORO,

Petitioner,

—v.—

MAHER TERMINALS, INC.,

Respondent/Cross-Petitioner,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT/CROSS-PETITIONER IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH T. STEARNS
Counsel of Record
KENNY & STEARNS
Attorneys for Respondent/ Cross-Petitioner
26 Broadway
New York, New York 10004-1882
(212) 422-6111

BEST AVAILABLE COPY

50 PM

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF JURISDICTION	3
SUMMARY OF ARGUMENT	4
STATEMENT PURSUANT TO RULE 15 OF PERCEIVED MISSTATEMENTS OF FACT AND LAW	8
ARGUMENT	19
THE ORIGINS AND ERROR OF THE DOUBT RULE	19
CONCLUSION	28

TABLE OF AUTHORITIES

Cases PAGE

Addington v. Texas, 441 U.S. 418 (1979) 8

Atlantic Marine, Inc. v. Bruce, 661 F.2d 898 (5th Cir. 1981) 18

Avondale Shipyards v. Kennel, 914 F.2d 88, 90-91 (5th Cir. 1990) 10

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408 (1932) 18

Barnson v. U.S., 816 F.2d 549 (10th Cir. 1987) 28

Bath Iron Works Corp. v. White, 584 F.2d 569 (1st Cir. 1978) 10

Betz v. Arthur Snowden Company, 14 BRBS 805 (1981) 2, 9

Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983) 18

Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962) 19

Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947) 20

Charlton v. FTC, 543 F.2d 903 (D.C. Cir. 1976) 6

Consumer Products Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 28

DelVecchio v. Bowers, 296 U.S. 280 (1935) 20, 26, 28

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 29

PAGE

Eschbach v. Contractors, Pacific Naval Air Bases, 181 F.2d 860 (7th Cir. 1950) 19, 20

F.H. McGraw & Co. v. Lowe, 145 F.2d 886 (2d Cir. 1944) 19

Fidelity & Casualty Co. v. Burris, 59 F.2d 1042 (D.C. Cir. 1932) 19, 21

Freeman United Coal Mining Co. v. Director, OWCP, 999 F.2d 291 (7th Cir. 1993) 28

Gober v. Matthews, 574 F.2d 772 (3rd Cir. 1978) 16

Gooding v. Willard, 209 F.2d 913 (2d Cir. 1954) 19

Greenwich Collieries v. Director, OWCP, 990 F.2d 730 (3rd Cir. 1993) 4, 6, 12, 17, 21

Gunning v. Cooley, 281 U.S. 90 (1930) 24

Hensley v. Wash. Metro Area Transit Authority, 655 F.2d 264 (D.C. Cir. 1981) 10

Hughes v. Dist. of Col. Greater Wash. Labor Council, 498 A.2d 567 (D.C. 1985) 29

Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966) 18

Lincoln v. Virgil ___ U.S. ___, 113 S.Ct. 2024 (1993) 28

Martin v. OSHRC, 111 S.Ct. 1171 (1991) 6

Mid-Gulf Stevedores, Inc. v. Neuman, 462 F.2d 185 (5th Cir. 1972) 10

Mobile, J&K.C.R. Co. v. Turnipseed, 219 U.S. 35 (1910) 17

Morrison-Knudsen Const. Co. v. Director, OWCP, 461 U.S. 624 (1983) 29

PAGE

Mullins Coal v. Director, OWCP, 484 U.S. 135 (1987) .9, 27-29

New York C.R. Co. v. Ambrose, 280 U.S. 486 (1930).. 24

NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292 at 300 (1939) 6, 7, 22, 23. 24

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).....3, 23

Noble Drilling Co. v. Drake, 795 F.2d 478 (5th Cir. 1986).....10, 24, 25, 27, 28

Parsons Corp. of Cal. v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980) 10

Patton v. Texas P.R. Co., 179 U.S. 658 (1901)..... 24

Southern Pacific Co. v. Sheppeard, 112 F.2d 147 (5th Cir. 1940) 19

Southern S.S. Co. v. Norton, 101 F.2d 825 (3rd Cir. 1939) 19

Sprague v. Director, OWCP, 688 F.2d 886 (1st Cir. 1982) 10

Steadman v. SEC, 450 U.S. 91 (1981) 3, 6, 7

Stevenson v. Linens of the Week, 688 F.2d 93 (D.C. Cir. 1982) 10

Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th Cir. 1962) 16

U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608 (1982).....20, 26, 27

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 20

Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968) 22

PAGE

Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968) 24

White v. Abrams, 495 F.2d 724 (9th Cir. 1974) 25

Young & Company v. Shea, 397 F.2d 185 (5th Cir. 1968) 20, 21, 22

Statutes and Rules

Title 5 U.S.C. Section 554 1

Title 5 U.S.C. Section 556 ..... 3, 6

Title 5 U.S.C. Section 557 ..... 3, 9

Title 28 U.S.C. Section 1254 4

Title 30 U.S.C. Section 901 *et seq.* 4, 21

Title 33 U.S.C. Section 901 *et seq.* 1

Title 33 U.S.C. Sections 902(2) and (10) 18, 20, 25

Title 33 U.S.C. Section 903 ..... 18, 20, 21, 25

Title 33 U.S.C. Section 907 1

Title 33 U.S.C. Section 908 1

Title 33 U.S.C. Section 909 1

Title 33 U.S.C. Section 919 ..... 1, 3, 23

Title 33 U.S.C. Section 920 ..... 2, 10, 16, 17, 20, 21, 24, 25, 26, 27, 28

Title 33 U.S.C. Section 921 ..... 2, 16, 28, 30

Title 33 U.S.C. Section 923 5

Federal Rule of Evidence 301 20

Federal Rule of Evidence 401 ..... 10, 11

PAGE

20 C.F.R. Part 702 5

Other Authorities

Weinstein's *Evidence*, Vol. I, Rules 101-403 ..... 27, 28

STATEMENT OF THE CASE

Petitioners, Pasqualina Santoro, and the Solicitor General of the United States on behalf of the Director, Office of Workers' Compensation Programs ("OWCP"), seek review of the April 19, 1993 decision of the United States Court of Appeals for the Third Circuit vacating an Administrative Law Judge's award of benefits for Mrs. Santoro's late husband's medical expenses, disability and death pursuant to Sections 907, 908, 909 [Sections 7, 8 and 9] of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Sections 901, *et seq.* [1972], and remanding for further proceedings. The ALJ, by decision and order dated November 22, 1988 following hearing provided by Longshore Act Section 19(d), which ". . . shall be conducted in accordance with Section 554 of Title 5 of the United States Code [the Administrative Procedures Act, 5 U.S.C., Section 551, *et seq.*]" (Pub. L. 92-576 (1972)), awarded benefits after review of the conflicting evidence on the issue of "causality" between Mrs. Santoro's husband's injury at work for respondent, Maher Terminals, Inc. on July 23, 1985 and his death March 11, 1986, due to "cardiac arrest" as "a consequence of . . . cervical astrocytoma" (A-29)[1]. The factfinder did not, however, decide whether or not injury at work, on account of which compensation for temporary total disability pursuant to the Act's Section 8(b) had been paid, had, in fact, contributed to the harm to Mrs. Santoro for which benefits were sought, as a result of her late husband's disability after he returned to work August 1, 1985 and his allegedly hastened death. Instead, the Administrative Law Judge rejected respondent's evidence denying causal connection between employment and disability and death caused by cancer, not as incredible or inaccurate, but because ". . . inconsistent with the purposes and policy of the

---

[1] References preceded by "A" identify Appendix pages in Mrs. Santoro's petition (93-474). Those followed by "a" are found in the petition of the Director, OWCP, United States Department of Labor (93-744). References followed by "AM" are to pages in the Appendix to this Brief.

[Longshore] Act" (A-44). Not having weighed respondent's proof in relation to Mrs. Santoro's evidence, the Administrative Law Judge held nonetheless: "The issue of causality is still deemed debateable, but the doubt is resolved in favor of the Claimant" (A-44). As a result of applying what petitioners describe as the "true doubt rule", the ALJ ". . . found and concluded that . . . disability and death is causally related to . . . [the] . . . accident on July 23, 1985" (*Ibid*). In his December 15, 1988 "ruling" denying respondent's petition for reconsideration, the Longshore Act factfinder observed ". . . the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the requirements of the Administrative Procedures Act and the views expressed by the Benefits Review Board in *Betz v. Arthur Snowden Company*, 14 BRBS 805 (1981)" (A-46).

By decision March 27, 1992 the Benefits Review Board, empowered to hear and determine appeals ". . . based upon the hearing record . . ." pursuant to Longshore Act Section 21(b)(3), affirmed, determining that the award was ". . . supported by the substantial evidence in the record considered as a whole", a decision from which respondent appealed to the Court of Appeals for the Third Circuit as provided by the Act's Section 21(c). In an opinion filed April 19, 1993 (992 F.2d 1277) that court reversed, holding that Mrs. Santoro was required—the Longshore Act Section 20(a) presumption ". . . [t]hat the claim comes within the provisions of this chapter . . ." having been rebutted and there being no issue of right to benefits dependent upon respondent establishing an affirmative defense—to prove her entitlement by the preponderance of the evidence.

The court of appeals considered the issues in two parts: whether the Administrative Procedures Act "prohibits the application of the true doubt rule" because it establishes a standard of proof by the preponderance—something different from whether the same standard existed prior to Procedures Act adoption—and whether the APA also required that this

burden in Mrs. Santoro's case be allocated to the benefits claimant. In rejecting application of a rule of doubt in Longshore Act benefits claim factfinding, the court of appeals held that because the Longshore Act Section 19(d) incorporates the APA, Section 556(d), i.e., the Administrative Procedures Act Section 7(c), controlled. It interpreted *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) as holding that the first sentence of the Section 556(d), which provides: "Except as otherwise provided by statute, the proponent of a rule of order has the burden of proof", refers only to the burden of production. But it also decided that *Steadman v. SEC*, 450 U.S. 91 (1981) held that the third sentence of Section 7(c): "A sanction may not be imposed or ruled or order issued except . . . [when] . . . supported by and in accordance with the reliable, probative, and substantial evidence" established a "standard of proof" by the "preponderance of the evidence". With respect to who should bear the burden of persuasion and, with that, the risk of decisional error, the court of appeals concluded that the only interpretation of the first and third Section 7(c) sentences which would not ". . . contravene the statute or suggest an impossibility is one which allocates the burden of persuasion to the proponent of the order, i.e., the party initiating the proceeding, on the issues raised by that party, but allows the burden to be shifted . . . as to issues raised by the opponent, i.e., affirmative defenses." So holding, the court of appeals remanded since "[I]t is not clear if the ALJ . . . ever considered whether the claimant's evidence satisfied the preponderance of the evidence standard".

STATEMENT OF JURISDICTION

On September 23, 1993 petitioner Santoro filed a timely petition for writ of certiorari seeking restoration of her award of benefits. On October 22, 1993 respondent filed a cross-petition asking in the event Mrs. Santoro's petition was granted for a writ in order to have this Court review the appropriateness of the order of remand. On November 10,

1993 the Solicitor General filed a petition on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor seeking review of the decision of the Third Circuit Court of Appeals in Mrs. Santoro's case and in *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, decided by the same court March 23, 1993, which is said to involve issue of the alleged "true doubt rule" in claims brought under the Black Lung Benefits Act, 30 U.S.C. Section 901, *et seq*. The Court has jurisdiction pursuant to 28 U.S.C., Section 1254(1).

SUMMARY OF ARGUMENT

Mrs. Santoro's case is presented by the court of appeals' analysis and petitioners' argument as involving issue of whether Longshore Act decisional law prior to APA enactment[2], which allegedly allocated the burden of persuasion on all entitlement issues to the employer, controls with the claimed result that the true doubt ruled is valid, or but for the APA would be valid; or, instead, as the court of appeals' opinion might be read as suggesting but does not hold, adoption of the Procedures Act altered existing law by imposing a burden of persuasion by the preponderance of the evidence upon the benefits claimant. The Solicitor acknowledges (Pet., pp. 21-22) that the standard of proof on every Longshore Act benefits claim issue *is* the preponderance, but asserts that what is said to be the traditional allocation of the risk of non-persuasion was improperly disturbed because the court of appeals' interpretation of the Procedures Act reveals an "ambiguity . . ." which is "best accommodated, not . . . by placing the risk of non-persuasion always on the party seeking to change . . . the *status quo* . . . , but by allowing the Agency to determine . . . which party should bear that risk . . ." (Pet., p. 22). The Solicitor thus describes the doubt rule as involving nothing more than allocation of the risk of non-

---

[2] Act of June 11, 1946, c. 324, 60 Stat. 237.

persuasion; and for this reason it can be applied *only when* the conflicting evidence has been determined to be of identical perceived credibility and accuracy. The government justifies the Agency's alleged right to make the allocation because ". . . the principle that doubts are resolved in favor of the claimant was firmly established as a rule of construction under the . . . [Longshore Act] . . . when the . . . [Administrative Procedures Act] . . . was enacted (Pet., p. 23); and that "the 'true doubt rule' represents, in effect, the Secretary's administrative judgment, developed in conjunction with and long accepted by the courts that . . . [the] . . . risk [of non-persuasion] should rest on the employer" (Pet., p. 16). By arguing "deference" the government claims that the Secretary of Labor has the right to transfer the burden of persuasion to the employer on every entitlement issue in the event the courts have not done so, despite the fact that there is no evidence that the Agency ever believed itself so empowered. In no Longshore Act regulation is provision made for a rule of doubt in administrative law judge determinations of fact despite the Act's Section 23(b). See, 20 CFR Part 702.

The "true doubt rule", which both petitioners misdescribe, does *not* merely reallocate the risk of non-persuasion, it creates a standard of proof applicable to evidence presented by the claimant which is not only less than by the preponderance it is so much less that the risk of failure to abolish "any" doubt on all issues belongs to the employer. Nonetheless, both petitioners claim that evidentiary "equipoise", or that the proof supporting or opposing entitlement to benefits be found "equally probative" or "evenly balanced", is required before the rule may be applied. This supposed threshold of doubt rule applicability is, however, not found in the decisions of the courts of appeals and by the Benefits Review Board; and in no case is the rule's use rejected because the only allegedly required determination was not made by the finder of fact. The rule, which petitioner Santoro claims ". . . is not an affirmative rule of evidence or procedure but is a deadlock

breaking device" which is "within the discretion of the fact finder" to employ (Pet. p. 7), since admittedly not a principle of required application, *cannot* be law. The government's effort to justify the rule by describing it as a mere reallocation device applicable after weighing in the event conflicting evidence is found to be in "equipoise"—considered in light of what in *Maher Terminals, Inc.* and *Greenwich Collieries v. Director, OWCP* were the actual bases of the awards of benefits—establishes that the Agency's argument, which in any event is not an interpretation of any Longshore Act provision, is a *post hoc* rationalization entitled to no deference. *Martin v. OSHRC*, ___ U.S. ___, 111 S.Ct. 1171, 1179 (1991).

That there is any "doubt rule" applicable to Longshore Act benefit claim finding of fact is rejected by this Court's precedent. Most fundamentally, since the true doubt rule lessens the standard of proof below the preponderance of the evidence as the court of appeals held (992 F.2d at 1285), it contradicts not only the Administrative Procedures Act but this Court's "substantial evidence" definition as well. In *Steadman v. SEC*, *supra*, this Court observed (450 U.S. at 99) that Section 7(c) "in accordance with" meant "not simply supported by enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury", which as the Court said is substantial evidence as defined in *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300 (1939). It did so in holding that the Procedures Act established a standard of proof *less than* applicable decisional law provided before APA enactment. As this Court also held (450 U.S. at 100 n.20), because ". . . the reviewing court is not to weigh the evidence . . .", the "functions of initial decisionmaking and judicial review of it" are "different", for which it cited *Charlton v. FTC*, 543 F.2d 903 at 907 (D.C. Cir. 1976), a case which holds: "Nowhere in our jurisprudence [i.e., *in American law*] have we discerned acceptance of a standard of proof tolerating something less than the weight of the evidence". In

Steadman the Court held further (*Ibid.* at 99): "Obviously, weighing evidence has relevance only if the evidence on each side is to be measured against a standard of proof which allocates the risk of [adjudicative] error". It thus appears that the true *Steadman* holding is "not simply" that Administrative Law Judge's findings of fact had to be made pursuant to what *NLRB v. Columbian Enameling and Stamping Co.* required prior to APA enactment, but that, as a result of enactment of the APA, findings of fact must *always* be made, in absence of contrary provision in the authorizing statute, by the ALJ on the basis of what he or she deems to be the preponderant evidence. In sum, *Steadman v. SEC* need not be read as holding that the Procedures Act *created* the preponderance standard; and that it had not existed before its adoption. What *Steadman v. SEC*, *supra*, however, unquestionably holds, as a result of this Court's rejection of the dissenting view, that the APA should not alter existing standards established by decisional law before that enactment, is that, were there a doubt rule in Longshore Act factual determinations prior to adoption of the Procedures Act in 1946 as petitioners mistakenly claim, the APA abolished it.

The origin of a rule of doubt has also been inaccurately described by petitioners, since no such rule was *ever* applied to Longshore Act factfinding prior to 1968, more than 40 years after the Act's adoption[3]. Moreover, the rule cannot be valid unless factfinder doubt, itself, is substantial evidence, in which event Section 21 review becomes a matter whether it can be determined that the ALJ "properly considered" the conflicting evidence before awarding benefits, not by actually deciding the factual issues upon which entitlement to benefits depends, but after determining that "there is a significant basis for true doubt" that benefits should be denied.

---

[3] March 4, 1927, c.509, 44 Stat. 1424.

STATEMENT PURSUANT TO RULE 15 OF PERCEIVED MISSTATEMENTS OF FACT AND LAW

Both petitions urge validity of the "true doubt rule" because "[f]or fifty years or more" (Solicitor's Pet., p. 14) part of Longshore Act law. This alleged rule, which is concededly based upon the statute's "humanitarian" purpose or "policy" of "liberal" administration as opposed to any Longshore Act provision, applies in the event that the evidence is "equally probative" or is in "equipoise" on any and all "doubtful factual issues" (Santoro Pet., p. 6); or on ". . . those factual questions in which the evidence is found to be in equipoise" according to the Solicitor General (Pet., p. 15). Neither Mrs. Santoro nor the Solicitor clearly identifies what, if any, finding, other than that the factfinder is not convinced that benefits are *not* owed, is required before an Administrative Law Judge only *may* apply the "true doubt rule", i.e., whether a predicate determination that the conflicting evidence *is* of identical credibility and perceived accuracy must be made; or whether it is properly employed even when there is only doubt that benefits should be denied. Evidentiary "equipoise" with respect to each essential fact and a rule of doubt applied to all factual issues arising from contravention is not only meaningless, it cannot be reconciled with the reality that determinations from conflicting evidence are never doubt-free, as well as the fact that any standard of proof allocates the risk of decisional error (*Addington v. Texas*, 441 U.S. 418, 423 (1979)). In "equipoise" and "equally probative" are, moreover, ambiguous. For this reason, it is not sufficient for the Solicitor to claim that "the rule provides only that when the adjudicator finds the evidence on each side evenly balanced (taking account of both its quantity and its quality), the doubt finally remaining should be resolved in favor of the claimant" (Pet., p. 15). It as well as the assertion: "In the Secretary's view, an Administrative Law Judge should find the evidence evenly balanced only in narrow circumstances, after carefully considering all the evidence and exhausting all

methods of evaluating it" (*Ibid.*, p. 15) do not dispel uncertainty, they add it. It is not apparent what the Solicitor intends by the alleged requirement that the factfinder "take[ ] account of the quantity and quality of evidence". Similarly unclear is what an ALJ need do before it can be said that he or she "carefully consider[ed] all the evidence and exhaust[ed] all methods of evaluating it"? And what do petitioners intend "in equipoise", "equally probative" or "evenly balanced" actually mean? No answer is provided by the Solicitor's claim that the "rule provides that when evidence submitted by the claimant and the party opposing the award of benefits is of equal weight, the remaining doubt is resolved in favor of the claimant" (Pet., p. 4); or, contradictorily, since doubt is possible even when the conflicting evidence is thought to be of vastly disparate weight favoring denial of benefits when "weight" means credibility and accuracy, by quoting this Court's doubt rule description (*Mullins Coal v. Director, OWCP*, 484 U.S. 135, 144 n.12 (1987)), asserting that ". . . where true doubt exists, that doubt shall be resolved in favor of the claimant" (Pet. p. 25).

Use of the "true doubt rule" is affirmed by the Benefits Review Board in absence of any predicate finding which might be said to constitute a declaration of evidentiary "equipoise"; or demonstration even that the conflicting evidence has, in fact, been weighed for comparison of relative credibility or accuracy. APA Section 557(c)(3) to which neither petitioner refers, however, provides: "All decisions . . . shall include a statement of—(A) findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record". The Board's decision in *Betz v. Arthur Snowden*, 14 BRBS 805 (1981), which according to the Solicitor establishes procedural safeguards which make "the 'true doubt rule'. . . plainly permissible" (Pet., pps. 15-16), does *not* require a finding that the conflicting evidence is of equal credibility and perceived accuracy before the doubt rule may be applied.

The rule, instead, applies to any and all doubts as the Benefits Review Board held (A-21). See, e.g., *Avondale Shipyards v. Kennel*, 914 F.2d 88, 90-91 (5th Cir. 1990); *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 574 (1st Cir. 1978). Despite petitioners' description, the doubt rule in longshore cases has been said to apply in determining whether or not the Longshore Act Section 20(a) presumption, ". . . that the claim comes within the provisions of this chapter", has been rebutted and, hence, before evidentiary equipoise is possible. *Hensley v. Wash. Metro Area Transit Authority*, 655 F.2d 264, 267, 268 (D.C. Cir. 1981); *Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir. 1982). It has been further held that it need not be employed when the issue of entitlement to benefits is "close". *Sprague v. Director, OWCP*, 688 F.2d 886 (1st Cir. 1982). On the other hand, Longshore Act benefits have been awarded as a result of the doubt rule in absence of evidence which would meet the test of relevance defined in F.R.Evid. 401 as ". . . having any tendency to make the existence of a fact . . . more probable or less probable", i.e., when the evidence supporting compensability was only that a connection between employment and disability for which benefits were sought was "possible". *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986); *Mid-Gulf Stevedores, Inc. v. Neuman*, 462 F.2d 185 (5th Cir. 1972). Contrary to petitioners' description, the "true doubt rule", in fact, allows evidence which would not be admissible in any case tried to a jury to be the basis of an award of benefits; or, when claimant and the employer offer conflicting relevant proof, it dispenses with requirement that such evidence be weighed. Although neither petitioner says so, these two applications of the actual rule are reflected in the initial decisions in the cases subject to the Solicitor's petition; and Benefits Review Board's affirmance of both demonstrates that the rule cannot be reconciled with the petitioners' characterization of it, however vague. Instead, affirmance shows that the "true doubt rule" is actually an avoidance device which allows an ALJ to

award benefits without deciding the issues upon which the right to benefits depends. The "principle" which informs the actual rule is only that *no risk* benefits might be mistakenly denied should be tolerated.

Greenwich Collieries v. Director, OWCP

In the Black Lung Benefits Act case which the Solicitor would have this Court review, benefits were awarded after the evidence supporting compensability, on the basis of claim that there was X-ray evidence of the presence of pneumoconiosis, was found to be "significant enough to raise true doubt" (41a). Since as the Board acknowledged it cannot reweigh the evidence (18-19a), its affirmance establishes that the ALJ's finding means the same thing as the Board's determination that the factfinder had "properly discussed and weighed all relevant medical evidence" before finding conflicting readings of allegedly positive X-rays "equally probative" (20a). The award, however, does not reflect that this evidence was, in fact, weighed, since all the ALJ did was conclude that she was ". . . not impressed or persuaded by the fact that the employer was able to produce a greater number of negative interpretations" (41a). Thus, in the Board's view "probative" must mean "relevant" as defined in F.R.Evid. 401, since only judged by this standard is all evidence which can be said to be probative equally so. That this is so is apparent from the holding that the Administrative Law Judge did all that needed be done in deciding the issue of disability: The Board found that "her discussion of the medical evidence . . . supports . . . the inference that she had *properly considered* all the conflicting evidence" (22a, emphasis added). This means that an ALJ who in his or her discretion chooses to apply the rule need search only for some evidence in the record which if considered in isolation would support an award; but the factfinder need *not* actually either believe it or trust its accuracy, save, as will be shown, to the extent he or she decides it is not inherently incredible or patently unreasonable. In the

event the Benefits Review Board agrees that it is not, evidence "significant enough to raise true doubt" is substantial evidence supporting an award based upon a finding of doubt and not fact. Surely, the decision of the Benefits Review Board in *Greenwich Collieries v. Director, OWCP* establishes that as a result of the doubt rule it is proper for an ALJ to award benefits without conflicting evidence being found in "equipoise" after it has been exhaustively weighed, as the Solicitor has mistakenly suggested must be done before the rule may be invoked.

Maher Terminals, Inc. v. Director, OWCP

In Mrs. Santoro's case, although in denying rehearing the ALJ, unlike in *Greenwich Collieries v. Director, OWCP*, in fact, characterized the "conflicting evidence" as "equally probative" (A-46), he could not have weighed respondent's evidence which he rejected for reason of Longshore Act "policy". In addition, the basis for his award of benefits was doubt about an issue to which the parties *agreed*. The decision of the ALJ and the Benefits Review Board in Mrs. Santoro's case carries issue of the doubt rule in Longshore Act cases an additional step—doubt need not be a matter of evidence in the record and, instead, can arise in the mind of the factfinder despite agreement that doubt is baseless. Neither petitioner acknowledges that the Benefits Review Board recharacterized the ALJ's finding that the conflicting evidence had been "equally probative" as "in equipoise"; or that the Board also said without *any* basis that the Administrative Law Judge had found petitioner's expert's testimony "credible". For this reason, it determined that the witness' opinion, which was said correctly to have concerned only the effect of edema caused by trauma (1-7 AM)—which there is no evidence the Administrative Law Judge believed and which it is certain was *not* the basis of his award of benefits—required that it affirm. The Solicitor also affirmatively distorts the record in Mrs. Santoro's case—the government alleges that claimant's expert

testified that injury at work hastened disability and death "by aggravating a tumor that was previously dormant and might have remained so for years" (Pet., p. 9) despite the fact that this witness testified that pre-existing disease was an aggravating factor only because its presence supposedly made the effect of "edema" critical (6 AM). Moreover, the Solicitor (Pet., p. 10), as did the Benefits Review Board (A-23), claims the Administrative Law Judge "credited" the claimant's expert's opinion "anchored in his experience as a hands-on neurosurgeon", without acknowledging that the opinion was only that "Claimant (*sic*) sustained some type of traumatic insult to or around his neck of which he complained from the very beginning" (A-40).

In Mrs. Santoro's case the issue of "causality" between work related alleged whiplash injury (for which benefits had been paid until the day before deceased returned to work eight days after his injury) and subsequent disability and death from cancer of the cervical spinal cord was addressed at the Section 19(d) hearing by Bennett W. Derby, M.D., who testified for respondent, and by David I. Yazdan, M.D., a neurosurgeon who performed exploratory surgery on deceased August 19, 1985 and who testified as petitioner's medical witness. According to respondent's expert, deceased had astrocytoma for a "long, long time" before injury at work, a portion of which ". . . abruptly escalated, intrinsically, naturally, spontaneously, biologically in and of itself without reference to any external event into an accelerated much more malignant phase of growth which started literally breaking down the spinal cord and did so piece by piece" (A-39). The Administrative Law Judge rejected this evidence, not because of any lack of credibility or factfinder concern for accuracy, but on account of close temporal coincidence between occurrence of injury at work on July 23, 1985 and onset of catastrophic symptoms no later than August 15, 1985 (A-44). According to decedent's treating neurosurgeon's "edema theory" (A-37), upon which Mrs. Santoro relied exclusively to establish connection between her late husband's injury at

work and her entitlement to benefits, although deceased had preexisting astrocytoma, later disability and death did not result from progression of disease but, instead, were caused by swelling *within* the cord directly *caused by* injury at work. This "*edema*" was supposedly thereafter aggravated by ". . . the constant rubbing of the swollen spinal cord against the vertebral canal owing to . . . ordinary regular movement of his head [which] gradually increased the swelling" which "led to neurological breakdown and hastened his death" (A-35). An essential part of this witness' view of "causality" which respondent's expert said was "medically impossible" (A-32) was his testimony that deceased's astrocytoma—which his report of operation (12 AM) described as "quite thin and fluctuant" (indicating that deceased's tumor was highly malignant), had, instead, been ". . . slightly fluctuant, very firm and leathery in consistency" (A-35) (indicating to the contrary)—had *not* been "cancer" (8 AM). It was because this was supposedly so that petitioner's witness claimed that deceased "might have gone another 15 or 20 years before he would [have] become symptomatic" (A-42) but for edema caused by injury (A-23, 1 AM). Thus, deceased's doctor, in sponsoring an explanation for disability and death in which pre-existing disease was not the direct cause, denied that there *had been* any escalation in the degree of malignancy of deceased's tumor. He specifically testified that "the injury did not cause the tumor to grow" (1 AM) and that initial and subsequently increasing "edema" and/or its consequences did not ". . . make[ ] the tumor bigger or increase[ ] . . . cell growth or anything else" (3 AM). It was evidentiary agreement denying "causality" in the event escalation in level of malignancy had occurred; or testimony establishing it because of "edema" directly caused by injury without escalation occurring, which was described by the Administrative Law Judge as "equally probative". Neither petitioner has informed this Court that the award of benefits was *not* based upon the factfinder's inability to decide which opinion was the more credible or accurate.

The Administrative Law Judge did not sponsor the credibility of petitioner's witness "edema theory". In addition to finding, not that "the" testimony had been "inconsistent or contradictory" (A-44) but as the Benefits Review Board observed that petitioner's expert's had been (A-22), the ALJ held that ". . . there is some merit to the employer's position, taking into account the difference it pointed to in[. . . petitioner's doctor's] . . . testimony that, in effect, . . . [his] . . . opinion is a gratuitous 'theory' to put the claimant's case in the best light" (A-40). On the other hand the factfinder determined that respondent's expert's testimony provided a "high level of persuasion" on all issues other than whether deceased had sustained injury to his neck at work at all (A-40); but as he also noted, this witness testified in any event that deceased's astrocytoma "is not known to medical science to be caused or aggravated by trauma" (A-44). Also certain is that the ALJ could not have awarded benefits because the "issue of causality remains debateable" after having rejecting respondent's evidence had he concluded that petitioner's doctor's testimony *had been* credible and accurate; in that event the weight of the acceptable credible evidence would have preponderated in Mrs. Santoro's favor. In addition, the reason for ALJ doubt was identified and this required rejection of petitioner's witness' testimony that deceased's astrocytoma had not been cancer; and all but surely because whatever his hearing testimony he had described it as "malignant looking" in his report of operation (11 AM).

What the Administrative Law Judge doubted was not that there *had been* "abrupt escalation of the underlying astrocytoma" which the finder of fact accepted, but both experts' opinion that this could in no way be related to trauma. Despite agreement that trauma did not cause deceased's astrocytoma and did not "make[ ] the tumor bigger or increase[ ] cell growth or anything else. . .", the ALJ observed that "the type of the Claimant's (*sic*) underlying neoplasm poses one of the greatest difficulties in resolving the basic issue in this

case". This "difficulty" arose from the fact that "[i]t seems evident or reasonable to acknowledge that the causes and factors controlling malignancy are still obscure and under research"; and the Administrative Law Judge immediately thereafter observed that although respondent's witness "testified that the disease is not known . . . to be caused or aggravated by trauma", there nonetheless was ". . . nothing in this record to indicate whether any statistical studies have been done in this area" (A-44).

In suggesting that there was "evidentiary deadlock", petitioners fail to acknowledge that the impact of the "true doubt rule" in Longshore Act cases is best demonstrated by the fact that it is improper to base an award, where as in Mrs. Santoro's case the issue does not enable the factfinder to decide upon the common sense of the situation, or when the record is not conclusive on the issue of causation (see, *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741 (5th Cir. 1962)), on adoption of an explanation which expert medical testimony rejects. See, *Gober v. Matthews*, 574 F.2d 772, 777 (3rd Cir. 1978). For these reasons, had the Administrative Law Judge held affirmatively that injury at work *had* caused abrupt escalation in level of malignancy such determination would have required the Benefits Review Board to vacate the award in Mrs. Santoro's favor. Mere confession of doubt as to the accuracy of both experts' rejection of this explanation for "causality" had, however, exactly the opposite effect. Doubt of the correctness of joint testimony was not just sufficient to make "conflicting" testimony "equally probative" it was enough for the Board to conclude that the award of benefits had been based upon "substantial evidence". In addition, the Benefits Review Board established what must be shown upon Longshore Act Section 21 review in order to avoid liability for benefits in a doubt rule case where the Section 20(a) presumption has been rebutted. In his decision and order awarding benefits the ALJ held that "[b]efore Section 20(a) is applicable, a claimant must establish that he or she sustained some harm, and that working conditions existed or that an

accident occurred that *could have* caused the harm " (A-30, emphasis added), an alleged obligation of the benefits claimant mis-characterized by the court of appeals as necessary "to establish a *prima facie* case" (992 F.2d 1279-80). After observing that the Section 20(a) presumption had been successfully invoked and rebutted, the Benefits Review Board affirmed: "Because the employer has failed to establish that the Administrative Law Judge's crediting (*sic*)" of claimant's doctor's opinion "is inherently incredible or patently unreasonable" (A-23). This showing is, of course, *identical* to what would be required—assuming that any evidence is needed for the Section 20(a) presumption to be invoked—in order to *deny* invocation, i.e., that the proof supporting entitlement to benefits was so infirm as to fail to establish even that the harm at issue "could have" been caused by work-related injury. Although neither petitioner says so, this means if the "true doubt rule" is valid, doubt is Longshore Act Section 21 "substantial evidence". Of course, the doubt rule shifts the burden of persuasion and with that the risk of non-persuasion to the Longshore Act employer, but to persuade the fact-finder of what? In Mrs. Santoro's case respondent was required to prove beyond doubt there was no *possible* connection between injury and subsequent disability and death. Despite the fact that there is, of course, no rational connection between Longshore Act employment and aggravation of cervical spinal cord cancer (see, *Mobile, J&K.C.R. Co. v. Turnipseed*, 219 U.S. 35 (1910)), respondent was found liable for benefits because the riddle of deceased's cancer has not been solved. As a result, the Section 20(a) presumption was *not rebuttable*. It is to *this* "interpretation" of the Longshore Act to which the government would have this Court "defer". There is no question at all that it is a result which the *actual* "any" and "all" doubt rule permits. Because the Solicitor seeks to have Mrs. Santoro's award restored, it is *this* rule, which allows "selection" of a "set of facts" favoring claimant as the Review Board held in *Greenwich Colleries* (19a, n. 3), which the Agency sponsors.

ARGUMENT

The sole issue raised by the petitions is how facts are to be found at administrative hearings of Longshore and Black Lung Benefits Act claims. Issues of what might be called "substantive" law, of course, also apply. Mrs. Santoro's award offers an example of a finding of fact insufficient to establish entitlement to benefits: that the record "establish[ed] and unbroken claim of events supporting a finding of causally-related neck pain" (A-44). It is not pain but ". . . incapacity because of injury to earn the wages which the employee was earning at the time of injury in the same or other employment" (Section 2(10)) which triggers the obligation to pay benefits in the event that the connection between "disability or death" which ". . . results from an injury" (Section 3(a)) is proven to be an ". . . accidental injury or death arising out of and in the course of employment . . ." (Section 2(2)). It has been, however, held to be enough to establish a right to benefits to show that an employment injury aggravates, accelerates or combines with a pre-existing condition (see, e.g., *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966)); and supervening cause is said to bar Longshore Act benefit claims only if having an "overpowering and nullifying effect" (*Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898 (5th Cir. 1981)), examples of how the law has been structured in way favorable to claimants beginning with this Court's decision in *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408 (1932). Such "humanitarian" interpretations of the Longshore Act concerning what need be proven as opposed to how all necessary facts must be established are not affected as a result of the court of appeals' decision in Mrs. Santoro's case.

THE ORIGINS AND ERROR OF THE DOUBT RULE

The first "true doubt rule" decision according to the Solicitor is *Fidelity & Casualty Co. v. Burris*, 59 F.2d 1042 (D.C. Cir. 1932), a case involving issue of "accidental injury" and "arising out of and in the course of employment" in which it was said: "Where there is doubt, it should be resolved in favor of the injured employee or his dependent family"; *and* that "[i]n this case the facts are all agreed". The second is *Southern S.S. Co. v. Norton*, 101 F.2d 825, 827 (3rd Cir. 1939) which involved interpretation of Longshore Act Section (2)(10) "disability", a question characterized by the court of appeals as "one of law" in which the court held that "it was quite apparent from the record" that claimant had proved his entitlement to benefits. In the Solicitor's next doubt rule case, *Southern Pacific Co. v. Sheppeard*, 112 F.2d 147, 148 (5th Cir. 1940), which involved death as a result of assault by a co-worker, the court of appeals held "the evidence is not in dispute". In *F.H. McGraw & Co. v. Lowe*, 145 F.2d 886, 888 (2nd Cir. 1944), the last of the Solicitor's cases prior to APA adoption, which involved Parkinson's disease allegedly caused by trauma, "one expert neurologist gave testimony that such . . . causal relationship existed"; and as a result the court concluded that it could not say that "the deputy commissioner did not base his finding of causal relationship . . . upon the evidence submitted". There is, in fact, *no* case in which any rule of doubt was held applicable to Longshore Act factfinding prior to enactment of the Procedures Act; and the Solicitor's claim that it was "firmly established as a rule of construction under the . . . [Longshore Act] . . . when the APA was enacted" is refuted by the government's authority itself. Omitted from argument in both petitions is citation to cases decided after adoption of the Administrative Procedures Act holding that the Longshore Act claimant had the "burden of proof" in the sense of risk of non-persuasion. See, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *Gooding v. Willard*, 209 F.2d 913 (2nd Cir. 1954); *Eschbach v.*

Contractors, Pacific Naval Air Bases, 181 F.2d 860 (7th Cir. 1950).

The first case in which it was held that a doubt rule applies to Longshore Act factfinding is *Young & Company v. Shea*, 397 F.2d 185 (5th Cir. 1968). This holding and every other thereafter contradicts the Longshore Act factfinder's duty of ". . . initially selecting the inference which seems most reasonable . . ." established in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947), a case decided after APA enactment but which involved a benefits claim arising before that time, since the doubt rule allows benefits to be awarded unless the ALJ is certain they should be denied. In addition, the rule, which according to the Benefits Review Board in Mrs. Santoro's case "comes into play" only after the Act Section 20(a) presumption is rebutted (A-21), requires the employer to "insure conviction", i.e., abolish doubt, that benefits are *not* owed. In *DelVecchio v. Bowers*, 296 U.S. 280 (1935), this Court held that the Longshore Act Section 20(d) presumption, "[t]hat the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another", is not evidence; and as a result an employer need not offer proof in rebuttal sufficient to "induce conviction" that the fact presumed is not so, a holding which rejects the same biased result which the doubt rule achieves. In *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 at 612 n.5 (1982) "coverage" of the Longshore Act Section 20(a) presumption was said to be "debateable" but also that it "seems fair to assume" that it is "of the same nature as the presumption created by Section 20(d) . . . as construed in *DelVecchio v. Bowers* . . . and the presumption defined in Rule 301 of the Federal Rules of Evidence"; and in order that entitlement to benefits not be mistakenly treated as disability and life insurance, this Court held that Longshore Act Sections 3(a) and 2(2) "work connection" had to be "proved". *Ibid.* at 615 n.10. In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-478 (1951), the Court held that the

Procedures Act had been adopted by Congress to discourage "the notion that it was enough that the evidence supporting the Board's result was 'substantial' when considered by itself", *exactly* what in *Greenwich Collieries* the ALJ did in considering but not deciding whether there was X-ray evidence of pneumoconiosis. Moreover, it is the identical approach which Mrs. Santoro urges by claiming that "the true doubt rule must be seen as a component of the substantial evidence rule" (Pet., p. 7). In addition, the justification for the doubt rule was initially said in *Young & Company v. Shea* to be existing case law; and in denying rehearing the court *en banc* additionally relied for its holding that the Longshore Act factfinding "standard is less" upon the alleged fact that "Congress has indicated an intention to require less", a conclusion for which only "33 U.S.C. Section 901 *et seq.*" was cited (404 F.2d at 1061 n.2).

In *Young & Company v. Shea*, *supra*, 397 F.2d at 188, the fifth circuit recited the doubt rule as expressed in *Fidelity & Casualty Co. v. Burris*, *supra*, without citing that case but others, in no one of which doubt was applied to the process of finding facts. It did so despite holding: "Under 33 U.S.C. Section 903(a) the claimant has the burden of proving all that is not presumed under section 920", thus establishing that the "true doubt rule" began not as a reallocation device but as a lessened standard applicable to claimant's proof. Because *Young & Company* involved question of collateral estoppel on account of a jury finding that claimant had sustained no injury, the court observed first that the "standard [of proof] before the jury is the preponderance-of-credible-evidence test" and next that "[a]lthough we cannot ascribe a legal label to the burden before the . . . [Longshore Act factfinder] . . . the statutory policy, *as interpreted by the courts*, indicates that it is a less stringent standard of persuasion" (*Ibid.* emphasis added). The absence, in fact, of a prior case establishing a rule of doubt applicable to finding facts in Longshore Act benefit claims proves that the doubt rule based upon "statu-

tory policy, as interpreted by the courts" was a mistake when originated—no such "policy" had ever before been found to control the process of finding fact.

More importantly, the holding that there is a "less stringent standard of persuasion" contradicts this Court's definition of what constitutes "substantial evidence". In *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, at 652 (5th Cir. 1968) the court of appeals held by quotation from *NLRB v. Columbian Enameling and Stamping Co., supra*, 306 U.S. at 299-300 that substantial evidence ". . . must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury"; and its excerpt omitted this Court's first definitional phrase: "Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established". This preliminary requirement, since "suspicion" is a source of doubt, proves that any rule of doubt had been rejected by this Court not later than nearly thirty years before its invention. In denying joint rehearing of *Watson v. Gulf Stevedore Corp.* and *Young & Co. v. Shea* (404 F.2d 1059) it was observed correctly that in a Longshore Act case ". . . the reviewing court applies the same rule to review the administrative proceedings that an appellate court applies in review of jury verdicts and in this respect . . . the scope of review of jury verdicts and of administrative findings is the same" (404 F.2d at 1061); and the court held, also correctly, that adoption of the Administrative Procedures Act ". . . did not change the scope of judicial review . . ." of Longshore Act factfinding (*Ibid.*). But it also decided that in reviewing the factfinder's decision ". . . the . . . court must take into account that the standard of persuasion is less . . . than it would be in a jury trial on the same issue" and, contradictorily, that "[n]othing said . . . [in *Young & Company v. Shea*] . . . intimates any modification of the substantial evidence rule . . . applied to the question . . . whether the . . . determination [to award benefits] should be accepted on review" (*Id.*).

Obviously, the question what constitutes substantial evidence is a matter of what the party with the burden of persuasion need prove in addition to how he or she may prove it. How all necessary facts must be established was fixed in *NLRB v. Columbian Enameling and Stamping Co.* and it is by evidence sufficient to justify in an ordinary case a civil jury verdict. This means that the trial judge in refusing to direct a verdict at the close of all proof has determined that the jury is entitled to decide the issues by the standard of the preponderance of the credible evidence—which the court thereafter charges must be the basis of its verdict—in favor of the party having the risk of non-persuasion. Since this jury trial test must be applied before the evidence upon which an award of benefits can be found to be "substantial", the proof standard by the preponderance of the credible evidence *must* apply to findings of fact. Creation of a "less stringent standard" applicable to factfinding, one less than the preponderance of the credible evidence although how much less the court of appeals could not say, *inevitably* affects the standard of review as this Court has defined it—if the evidence at the Section 19(d) hearing is less and as a result *would* justify direction of a verdict, i.e., would not, if believed, establish the claim by the preponderance of the evidence, what does the Benefits Review Board or the courts of appeals review for? It cannot be substantial evidence, i.e., proof which depending upon determinations of credibility and accuracy may properly be found to be preponderant, because the claimant need not offer such proof before benefits may be awarded. Review must therefore be only to determine whether evidence which need not have convinced was "inherently incredible or patently unreasonable" which, of course, is what the Board in Mrs. Santoro's case said it was. This means, in turn, that *neither* the ALJ *nor* the reviewing Board or court need determine whether the evidence is ". . . enough to justify, if the trial were to a jury, a refusal to direct a verdict . . ." In Longshore Act factfinding, it is not just the Administrative Procedures Act which is the "polestar which guides our course" to the

conclusion that facts essential to an award of benefits must be found by the preponderance of evidence (992 F.2d at 1285), it is, in addition, this Court's *NLRB v. Columbian Enameling and Stamping Co.* substantial evidence definition.

The doubt rule/substantial evidence contradiction is apparent in subsequent cases in which Longshore Act benefit awards were affirmed when the testimony concerning work connection was only a "possibility" that it "could have" caused the harm for which benefits were sought. *NLRB v. Columbian Enameling and Stamping Co.* would not, of course, allow an award of benefits based upon testimony of a possibility that disability and/or death arose out of and in the course of employment. In any jury trial evidence that is as consistent with a hypothesis that, for example, the defendant is negligent and with one that it is not, is proof which tends to prove neither. *Gunning v. Cooley*, 281 U.S. 90, 95 (1930)[4]. When a number of things may have brought about, again for example, an injury, for some which the defendant is liable and for some which it is not, it is not for the jury to guess in order to find that, for further example, the negligence of the defendant was the real cause. *Patton v. Texas P.R. Co.*, 179 U.S. 658, 663 (1901). This is because a verdict resting on speculation or conjecture cannot stand. *New York C.R. Co. v. Ambrose*, 280 U.S. 486, 490, 491 (1930). For this reason, in *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) the Section 20(a) presumption, which exists "in the absence of substantial evidence to the contrary", was held not to have been rebutted on account of the fact that the employer's proof was *not* substantial evidence because its medical expert "did *not* testify in any way as to . . . probability". The doubt rule "less stringent standard", however, allows speculation to support an award: It is sufficient if "it . . . [is] . . . possible" that working conditions were enough to "contribute" to the cause in fact of disability. See, *Noble Drilling Co. v. Drake*,

[4] Cited in *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. at 300.

supra, 795 F.2d at 480, in which that court affirmed a benefits award based upon doubt although it *acknowledged* it was ". . . satisfied that the claimant did not establish causation by preponderance of the evidence". Since proof of a possibility is not "substantial evidence", although the Fifth Circuit Court of Appeals insists that the fact finding and review standards are different, its undefined "less stringent standard" ensures that there is no standard of factfinding and, hence, of review.

Mrs. Santoro's case shows that it was the Section 20(a) presumption which was the basis of the benefits award despite the court of appeals' holding that ". . . the ALJ did not make use of the presumption in this case" (992 F.2d at 1280 n.2) and that effort to justify the doubt rule, as *Noble Drilling Co. v. Drake* also reflects, requires treating the presumption as the claimant's *prima facie* case. This demonstrates that the courts of appeals and the Benefits Review Board in applying the doubt rule mistake what a Longshore Act claimant need prove as well as how he or she need prove it. It has been said that a *prima facie* case ". . . consists of sufficient evidence *in that type of case* to get plaintiff past a motion for a directed verdict in a jury case" and: "It is the evidence necessary to require a defendant to proceed with his case". *White v. Abrams*, 495 F.2d 724, 729 (9th Cir. 1974). These definitions are not, however, equivalent when a presumption is involved. Assuming evidence is necessary to invoke the Section 20(a) presumption and that this need be only that work connection is possible, that evidence, once the presumption is rebutted, must fall out of the case if the presumption itself does. Moreover, it is because of the presumption's existence and *not* on account of the fact that claimant has presented "sufficient evidence *in that type of case* [i.e., a claim for benefits pursuant to the Act's Section 3(a) and 2(2)] to get . . . [claimant] . . . past a motion for a directed verdict in a jury case" that the employer must proceed, unless proof triggering the presumption is not just evidence after rebuttal it satisfies the substantive law requirement of what need be proved. In Mrs.

Santoro's case, this was whether her late husband's injury at work had, *in fact*, contributed to his subsequent disability and death, not that this was *possible*. Nonetheless, the court of appeals held that a Longshore Act *prima facie* case requires proof sufficient to invoke the presumption, failure of which "defeats the claim" (992 F.2d at 1279), although mere filing of claim may invoke it. In *DelVecchio v. Bowers*, *supra*, 296 U.S. at 286 this Court held that the "only office" of Section 20(d) presumption was to "control the result where there is an entire lack of competent evidence"; that "[i]t never had and cannot acquire the attribute of evidence in the claimant's favor"; and "[o]nce the employer has carried his burden of offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case". Since in Mrs. Santoro's case it was said by the Benefits Review Board that it was after the Longshore Act Section 20(a) presumption was invoked and rebutted that the "true doubt rule comes into play" (A-21), the rule requires that proof in opposition to an award of benefits "induce conviction" that benefits are not owed, exactly the view that "presumptions are evidence" rejected in *DelVecchio v. Bowers*. Since *DelVecchio v. Bowers*, held that "substantial evidence" as used in Longshore Act Section 20 need only be "sufficient to justify a contrary conclusion" and *U.S. Industries/Federal Sheet Metals, Inc.*, *supra*, holds that the work connection has to be "proved", it is not possible to read either case as other than *rejecting* the "true doubt rule". In Mrs. Santoro's case doubt nonetheless substituted for her witness' "edema theory"; and evidence said to have triggered the presumption was *not*, in fact, the basis of the award. For this reason had the presumption truly "fallen out" Mrs. Santoro would have been denied benefits. The Administrative Law Judge, in fact, rejected claim that her husband's disability and death "could have" been caused *for the reason asserted*. In *U.S. Industries/Federal Sheet Metals, Inc.* this Court held that the Longshore Act Section 20(a) presumption does not apply to claims not made, and not only did Mrs. Santoro not claim her husband's disease was caused to

increase in level of malignancy by reason of injury, she denied it. More importantly, mistaking the presumption for a "*prima facie* case" and evidence triggering it for proof sufficient to establish entitlement to benefits, together with a rule of doubt thereafter applicable, means that the presumption *always* controls the result, not "in absence of any proof" or when the proof is in "equipoise", but despite whatever proof if offered by a Longshore Act employer.

Of course, how proof, if any is required, sufficient to invoke the Section 20(a) presumption became confused with what a Longshore Act claimant need prove can be adequately explained only by the enduring character of the mistaken view that presumptions are evidence[5]. The true doubt rule has been said to ". . . ensure that the employer will win . . . only when its evidence is *stronger* than the claimant's" (*Mullins Coal Co. v. Director, OWCP, supra*, 484 U.S. at 144 n.12, precisely what a presumption which is justified by a rational connection can be made to achieve, but which this Court has held the Section 20(d) presumption does not. Surely, were there an intended bias in Longshore Act factfinding Congress would not have provided "in the absence of substantial evidence to the contrary" in Section 20. Instead, it would have required more. Of course, that presumptions are or ought to be evidence, i.e., should influence the result after rebuttal, is a mistake of ancient lineage. See, Weinstein's *Evidence* (Vol. 1, Rules 101-403, Section 300[01] pp. 300-1 to 5 (1989). This view of the effect of presumptions was, however, rejected by Congress in enacting the Federal Rules of Evidence (Pub. L. 93-595, January 2, 1975, 88 Stat. 1931). *Ibid*, Section 301[01] pp. 301-1 to 12, 37.

---

[5] Assisted by the practice of treating Benefits Review Board decisions as authority. See, *Noble Drilling v. Drake, supra*, 795 F.2d at 481. In U.S. Industries/Federal Sheet Metal, Inc. (455 U.S. at 615-16) this Court held that the presumption refers to "[a] prima facie 'claim for compensation' " and that it is "no substitute for the allegations necessary to state a prima facie case."

In *Noble Drilling Co. v. Drake, supra*, the Court held that the doubt rule is properly based upon ". . . broad general principles . . ." (795 F.2d at 482) but it nonetheless *must be* based upon some Longshore Act provision. The starting point in construing a statute is the language of the statute itself. *Consumer Products Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980); and the same word or phrase used in a statute more than once ordinarily should be given the same meaning. See, e.g., *Barnson v. U.S.*, 816 F.2d 549, 554 (10th Cir. 1987). Legislative "purpose" no less than legislative history divorced from statutory text is meaningless. *Lincoln v. Virgil*, ____ U.S. ____, 113 S.Ct. 2024, 2031-32 (1993). If substantial evidence has the same meaning in both Sections 20 and 21 proper construction requires that the Longshore Act be found to contain no bias in favor of finding facts supporting compensability. As this Court has held by rejecting the view that evidence rebutting a Section 20 presumption need "induce conviction" and, instead, deciding that it need only justify a contrary conclusion, and defining substantial evidence sufficient to support an award of benefits upon review in exactly the same terms, the "true doubt rule" contradicts Longshore Act Sections 20 and 21. Of course, since agency right to allocate achieves the same result rejected in *DelVecchio v. Bowers*, the government's claim of deference means that the Secretary of Labor may overrule the Supreme Court of the United States.

CONCLUSION

How despite massive Supreme Court precedent abolishing all possibility of a doubt rule applicable in administrative hearings it can be said that this Court, in *Mullins Coal v. Director, OWCP, supra*, "ducked" this only alleged issue (see, *Freeman United Coal Mining Co. v. Director, OWCP*, 999 F.2d 291, 293 (7th Cir. 1993, statement of Esterbrook, J.) is impossible to understand. In *Mullins Coal*, this Court

observed that the doubt rule meant "stronger employer evidence was required "on invocation and rebuttal" (484 U.S. 144 n.12). It rejected use of the rule on invocation and had no reason to decide whether it applied to rebuttal since mooted by Black Lung Act regulation, the effect of which putting the burden of persuasion on the employer not being disputed. Of course, since the rule applies to "all" doubts on "an" issue, to reject it once is to reject it *always*. It is, thus, awkward, surely, for members of that court to express the view that this Court must now "supply the cure" for an ailment which the courts of appeals created. Nonetheless, every consideration important to determining whether a writ of certiorari should issue exists in *Maher Terminals, Inc. v. Director, OWCP*, despite the fact that the decision of the Third Circuit Court of Appeals is correct. The retreat from the requirement of reasoned analysis which the "true doubt rule" reflects demonstrates that what is at risk is not less than the adversarial system of fact finding. An important justification for it seems to be concern for administrative economy, despite the fact that under both the Longshore and Black Lung Act claim frequently could not be more effectively promoted than by making a doubt rule applicable to the fact finding process. What this inappropriate argument also establishes is how unfair the rule is, especially to Longshore Act employers. In *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 261 n.9 (1979) this Court held that Congress in amending the Longshore Act in 1972 "made a determined effort to narrow the gap" between benefits and damages. The District of Columbia rejected the amended Act as its compensation statute because its expense made business in the District "non-competitive". *Hughes v. Dist. of Col. Greater Wash. Labor Council*, 498 A.2d 567, 569-70 (D.C. 1985). This Court has held that the 1972 Longshore Act amendments[6], since the result of compromise, are *not* remedial. *Morrison-Knudsen Const. Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983). As

---

[6] Pub. L. 92-576, October 27, 1972, 86 Stat. 1251.

of the time of filing of this Brief respondent will have paid compensation benefits amounting to $326,858 as a result of Mrs. Santoro's claim, no part of which is recoverable from her in the event respondent should ultimately prevail. See, Longshore Act section 21(b)(3) and (c).

DATED: New York, New York
December 10, 1993

Respectfully submitted,
JOSEPH T. STEARNS
Counsel of Record
KENNY & STEARNS
Attorneys for Respondent/
Cross-Petitioner
26 Broadway
New York, New York 10004-1882
(212) 422-6111

APPENDIX

DIRECT TESTIMONY OF DR. YAZDAN
(Hearing Transcript, pages 50-51)

A (Continued):

So he had a mixture of symptoms which were all precipitated one way or another by this accident.

Now, we are not saying that it was caused by the accident, so that's where the controversy is. You know, people think when somebody is saying about their spondylosis or the astrocytoma was caused by trauma. Well, that's not true. We know that's not true. Trauma does not cause neoplasm, any kind of neoplasm, we know that.

(pause)

Trauma, on one shot deal doesn't even cause a spondylosis. Although in multiple trauma and grinding does cause that.

However, go back in—go back to astrocytoma. This tumor or this lesion initially was dormant there and he might have gone another 15 or 20 years before he would become symptomatic.

(pause)

But this injury expedited the whole situation.

Q In other words, doctor, if I understand you correctly, the injury did not cause the tumor to grow.

A No.

Q It did cause edema, apparently.

A Yes, yes.

(pause)

Q And it was the edema within the limited opening.

A Yeah.

Q What do you call that, parameter, doctor?

A Limited opening, yeah, a space, yeah.

Q Limited space, which caused the symptomatology. Now what symptomatology are we talking about?

A We're talking about the second group of symptomatology which leads to the partial paralysis, sensory deficit and those things involving the extremities.

Neck pain and other things that he had, that was related to the—that was a direct result of the sprain and a strain of every past injury that he had.

(pause)

De—development of the paralysis was the result of the gradual swelling around the tumor within the cord.

* * *

Q I'm sorry. Was that the cause, doctor, of the paralysis to the left side of the body followed by the right side of the body?

A That's correct.

CROSS-EXAMINATION OF DR. YAZDAN
(Hearing Transcript, pages 133-34)

Q Now, that edema caused, according to you, pressure on the cord which was translated into neurological-type complaints and in the findings.

A Now you're introducing the spinal cord.

In order for you to understand that, you have got to imagine or visualize the anatomy of the neck of this particular patient, not any patient. This particular patient's cord was already slightly bigger. Listen to this.

His cord, diameter, was a slightly bigger than an ordinary individual without a tumor.

In other words, the space between this bony canal and the cord was diminished already. Therefore, even a minor sprain may put this guy in trouble because there is not enough room in there for the cord to maneuver.

Therefore, as an immediate reaction, you get the muscular response. Delayed reaction, because the patient keeps moving the neck in the subsequent several weeks, you will get further, further trauma, more and more trauma to the cord and which eventually leads to further edema within the cord.

No, none of these things makes the tumor bigger or increases their cell growth or anything else, or create a tumor.

But yes, trauma does create edema at different time at different level depending how the patient, where the edema is, what tissue is involved and how the patient is treating it. If it's not diagnosed, the patient keeps moving constantly, he keeps—

Q And that's—

A—traumatizing it, therefore, it's going to get worse, you see?

* * *

Q Doctor, in fact, you're saying something quite different, are you not? You're saying now that the sprain caused, even though it may have been slight, direct mechanical contact

between the bony canal and the tissue comprising the spinal cord.

A It's not different. I mentioned it, maybe in different—

Q You're talking—

A—terms, but—

Q You're talking about something that, according to your theory just now expressed—

* * *

HEARING TRANSCRIPT
(Pages 142-144)

Q The incident caused something to happen here on the shoulders or—or the neck or altogether.

A Both, both.

* * *

Q That did what?

A That did cause several things.

Number one, it causes permanent strain of the muscles.

Q All right.

A Number two, it causes swelling around the spine itself with the ligaments, which—which is arthritic and that causes severe pain.

Number three, began to rub against the cord or the dura, which is covering the cord.

Q Right.

A And in the beginning, this was not apparently enough to cause immediate neurological picture, but it just caused pain. But with the frequent trauma day after day after day, he gradually got worse and worse and worse and worse, until he wound up in the emergency room.

Nobody could explain how a simple cervical sprain could lift—could lead to this kind of a picture. Until we found out what happened, then we tried to put everything together and that's what I'm trying to do, put them together.

* * *

Q You're saying that there was mechanical contact between the cord or cord tissue and the dura—

A And the spinal canal.

Q —and the spinal canal—

A Yes.

Q —with the result of the development within the canal of edema.

A Edema around the tumor because you had a dormant tumor there which was silent. When you have a silent problem

where there is osteoarthritis or whether it's a tumor or whether it's a cyst, whatever; that area, the tissue surrounding the lesions more suspectable of developing edema than the rest of the body.

The trauma of this magnitude, which was not very severe, is not enough to cause a swelling in the cord and myelopathy.

However, if you have some pre-existing condition in the cord, then you have this trauma on top of it, yes; if it leads to a trauma on a crescendo fashion.

(pause)

(Transcript page 166)

Q Doctor.

A Yes.

Q The mechanics, according to this now-expressed explanation is again swelling, it's swelling within the cord.

A Yes.

Q Is that what you're saying?

A Around the lesion, which happened—which turned out to be astrocytoma.

Q Now, are you saying that—

A But it happened in—

Q —that swelling around the cord, this edema around—within the cord, within the cord itself—

A Yes.

Q —around the tumor—

A Yes.

Q —that that was the result of these consecutive traumas, beginning with the sprain of the neck on July 23rd, 1985?

(No response)

And following that—

A It's—

Q —in the course of ordinary use of the head and neck?

A Yes, yes.

* * *

Q You're saying that the rub, rub, rub of—

A The spinal cord.

Q —cord tissue—

A Yes.

Q —yes, the bony canal, in the period of time between July 23rd, 1985 and for example August 7th, 1985 caused swelling within the cord around the tumor which in turn caused the appearance of symptoms and signs of neurological dysfunction.

A That's right.

* * *

(at page 171)

Q Have a little patience with me doctor.

In fact, that this cancer—

A All right.

Q —this tragic cancer, this incurable cancer simply overtook—tragically overtook Michael—Michael Santoro?

(pause)

A I think that—

Q Is that a valid alternative—

A —no, no, No. it's not valid, no, no.

Q —explanation of the whole picture?

A No, it's not valid for the following reason:

Number one, you cannot refer to astrocytoma as cancer. For the following reason: cancer, in general, means anaplastic tissue in the body which spreads and kills the patient.

Astrocytomas of the brain and the spinal cord do not spread, the grow in situ, in place.

* * *

(At page 191)

(Answer continued)—that this gentleman had this tumor the same size, practically, before this accident and he wasn't symptomatic. How do you explain that?

Q A tumor of this kind, if the man is fortunate enough to live long enough and depending on how aggressive it is and it can be anything from weeks to months to years will at some point in time—

A Yes, at some point in time, will get—

Q —in—in God's due time, cause symptoms, is that not so?

A Eventually, yes.

(pause)

Q You say—

A Oh no, me? I never said that.

Q You say that that tumor, this tumor described by you in your operative report on August 19th, as it's been described

in this record, would've co-existed for 15 to 20 years without causing symptoms but for the fact that some alleged sprain of the neck occurred July 23rd, 1985.

(pause)

That's your testimony, isn't it, sir?

A Yes.

TESTIMONY OF DR. DERBY
(Hearing Transcript page 257)

Q Now, doctor, what is astrocytoma?

A An astrocyte is a type of cell in the central nervous system which serves as support and maintenance to the other cells which do the business. Those are the neurons and the neurons have long fibers coming out from them that run to wherever they're going to go and in the central nervous system the astrocytes provide some structure, so this whole complex of neurons and white matter and also nourish the cells and the fibers.

* * *

(at page 258)

Q Is astrocytoma curable?

A No. We manage it but we cannot cure it.

Q Is it a form of cancer?

A Yes, in lay terms it is cancer.

* * *

(at page 259)

Q Now the operative report first, doctor, would you tell us what of significance to you is reflected in the report of the operation.

A That this was a highly malignant astrocytoma centering on the third and fourth cervical segments but in fact in totality extending as high as the upper end of the laminectomy at the base of the skull and extending as low down as the lower end of the laminectomy at C-7, meaning that this tumor ran from the upper most spinal cord with its connection to the medulla, down through the entire cervical segments, all eight of them and into the upper thoracic cord.

The character of the tumor at its central portion described by Dr. Yazdan as a mushroom consisted of a thin out, fluctuant, soft area which was not a cyst and this was by definition a necrotic area. Necrosis which is tissue death was occurring within the tumor itself and this is a categoric finding in the most malignant, the most aggressive kind of astrocytoma.

11 AM

REPORT OF OPERATION

NAME SANTORO, MICHAEL

SURGEON(S) DR. YAZDAN

* * *

PREOPERATIVE DIAGNOSIS	QUADRIPLEGIA SECONDARY TO CERVICAL MYELOPATHY SECONDARY TO INTERMEDULLARY (sic) LESION.
POSTOPERATIVE DIAGNOSIS	INTERMEDULLARY LESION OCCUPYING SEVERAL SEGMENTS OF THE SPINAL CORD PREDOMINATELY AT C3-C4 WHICH APPEARED TO BE MALIGNANT LOOKING.
NAME OF OPERATION	DIFFUSE WIDE CERVICAL LAMINECTOMY. INTRADURAL EXPLORATION. MITRAL DISSECTION OF THE TUMOR AND PARTIAL RESECTION.

PROCEDURE: The patient was taken to the Operating Room on 8/19/85 where under satisfactory general endotracheal anesthesia, he was placed in prone laminectomy position leaning on two chest rolls and the head resting on a horseshoe cerebellar head rest . . . Following completed hemostasis, laminectomy was started from C2 to T1, and following unroofing of the canal, the laminectomy itself was widened to the articular facet region. It was readily noted that the dura was somewhat wider than (sic) C3-C4 area . . . Exploration was started with 6 power magnification which readily identified the area and the extramedullary portion of the intradural space was negative throughout except for spondylotic changes which were readily noticeable with a protrusion of most disc spaces. However, the prominent feature of the area was the mushroom deformity from back part of the cord to C3

and C4 which had totally destroyed normal anatomical feature of the spinal cord and the cord was extremely wide in this region. The top of the mushroom areas were quite thin and fluctuant . . . Further exploration showed that the tumor was extending deep in the cord and was extending upward more than downward. Further removal of tumor was done and initial frozen section report was inconclusive. However, several more pieces were sent and it was evident that even under 10 power magnification, that there was no line of demarcation between this lesion and, the tumor and the cord. Therefore the operation was terminated . . . .

/s/ _____
DAVID YAZDAN, M.D.
mc
D 8/21/85 T 8/21/85